



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

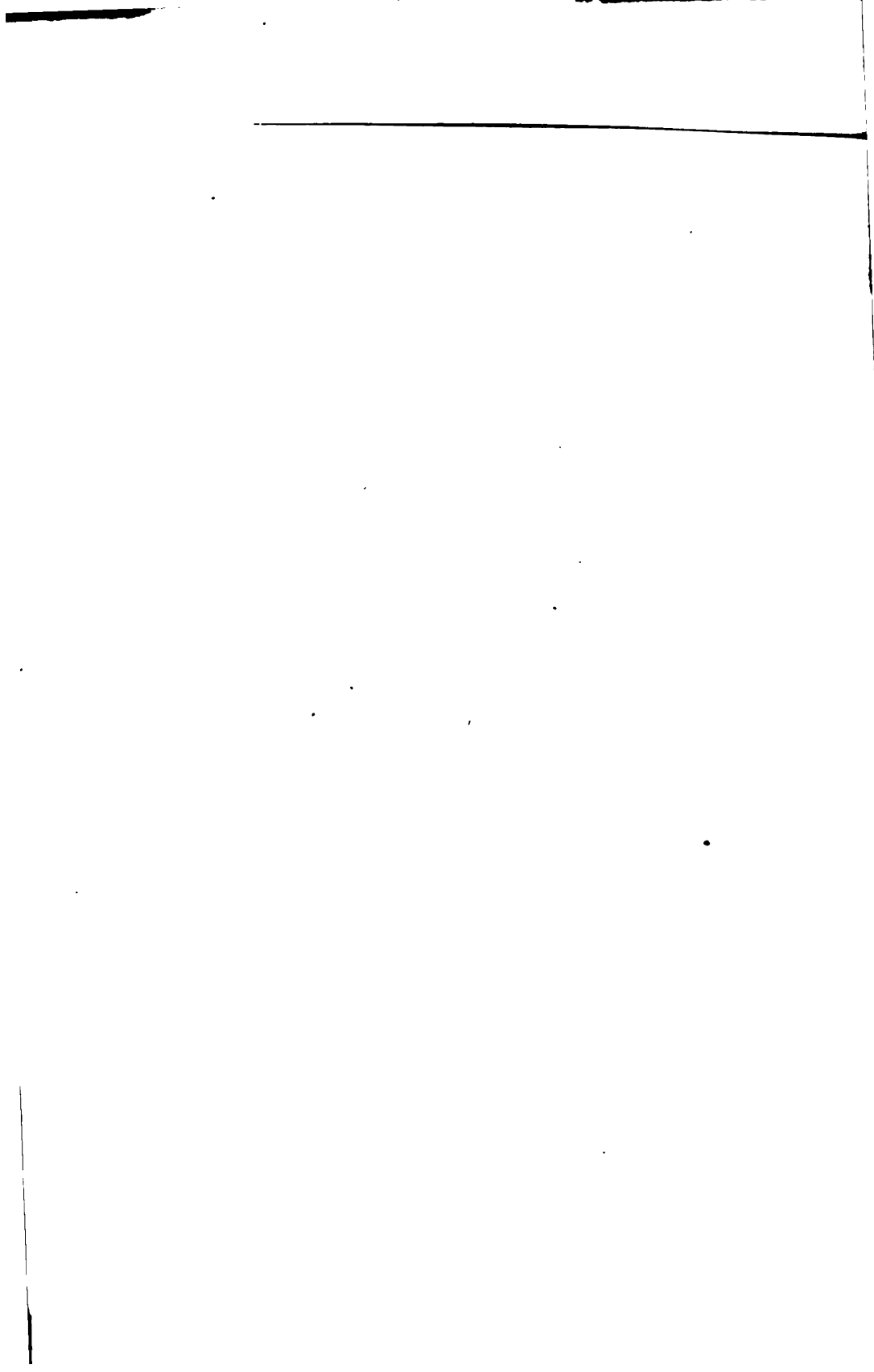
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





—

THE
LEGAL NEWS,

EDITED

BY

JAMES KIRBY, D.C.L., LL.D.,

Advocate.

VOL. XV.

MONTREAL:
THE GAZETTE PRINTING COMPANY.
1892.

93584

93584

TABLE OF CASES

REPORTED, NOTED, AND DIGESTED

IN VOL. XV.

Accident Ins. Co. of N. A. & McFee....	36	Bickford v. Cameron.....	380
Accident Ins. Co. of N. A. v. Young...	150	Bickford v. Hawkins.....	21
Adams v. Boucher.....	369	Borden v. Berteaux.....	7
Alexander v. Jenkins.....	194	Blachford v. McBean.....	149
Amyot v. Labrecque.....	101	Bourgeau & Brodeur.....	14
Anglo-Continental Guano Works & Emerald Phosphate Co.....	15	Bowker v. Laumeister.....	116
Argenteuil Election Case—Christie v. Morrison.....	101	Brantford, Waterloo & Lake Erie R. Co. v. Huffman.....	19
Ashdown v. Manitoba Free Press Co...	106	Briggs v. Spaulding.....	255
Ayr, American Plow Co. v. Wallace....	216	British America Insurance Co. v. Law	374
		Brossard v. Dupras.....	40
		Buck v. Knowlton.....	379
		Burroughs v. Reginam.....	167
Bagot Election Case.....	196		
Ball v. McCaffrey.....	164		
Bank of B. N. A. & Stewart.....	49	Cahan, <i>In re</i>	215
Banque Jacques Cartier & Leblanc....	66	Cameron v. Harper.....	280
Baptist v. Baptist.....	372	Campbell v. Grieve.....	152
Barrett v. City of Winnipeg.....	12	Canada Shipping Co. & Davison.....	274
Barton v. McMillan.....	154	Canadian Coal & Colonization Co. v. Reginam.....	359
Bawden v. London, Edinburgh & Glas- gow Ass. Co.....	340	Canadian Pacific R. Co. & Pellant....	275
Bazinot & Gadoury.....	36	Canadian Pacific R. Co. & Robinson...67, 70	
Beaulne v. Fortier.....	91	Central Bank, <i>Re</i> —Lye's claim.....	141
Bellechasse Election Case—Amyot v. Labrecque.....	101	Chandler Electric Co. v. Fuller.....	375
Bell Telephone Co. v. City of Quebec...	150	Christie v. Morrison.....	101
Benning v. Atlantic & Northwest R. Co.	51	Churchill v. Mackay.....	199
Benning v. Thibaudreau.....	99	City of Halifax v. Lordly.....	214
Bernardin v. Municipality of North Dufferin.....	55	City of Hamilton v. Township of Barton	117
		City of Winnipeg v. Barrett.....	293
		City of Winnipeg v. Logan.....	293

Clark v. Reginam.....	171	East Northumberland Election Case...	114
Clemens v. Supreme Assembly Royal Society of Good Fellows.....	235	Electric Despatch Co. v. Bell Telephone Co.....	108
Collins v. Ross.....	7	Emerald Phosphate Co. v. Anglo-Con- tinental Guano Works.....	373
Commercial Mutual Building Society & London Guarantee & Accident Co.	93	Essex v. McGregor.....	115
Compagnie de Chemin de Fer à Pa-sa- gers de Montréal & Dufresne.....	32		
Conger v. Treadwell.....	226		
Connecticut Fire Insurance Co. & Kavanagh.....	225, 308	Ferrand v. Bingley Township District Local Board.....	122
Connelly v. Great Northern R. Co....	365	Flatt v. Ferland.....	211
Corporation of County of Verchères v. Corporation of village of Varennes.	5	Fricke, <i>Re Will of</i>	241
Corporation of Town of Levis v. Reginam	213	Fyfe v. Boyce.....	327
Corporation of Verdun & Protestant Hospital for the Insane.....	58		
Corporation of Village of Huntingdon & Moir.....	37	Generoux v. Murphy.....	141
Corse v. Reginam.....	131, 171	German v. Rothery.....	153
Cottingham v. Grand Trunk R. Co....	38	Gibbins v. Barber.....	18
Couette v. Reginam.....	358	Gibbons v. McDonald.....	200
Couture v. Bouchard.....	371	Gibeault v. Pelletier.....	102
Couture v. C.P.R. Co.....	178	Glengarry Election—McLennan v. Chis- holm.....	9
Crowe v. Adams.....	376	Goodard v. Winchell.....	337
Cunningham v. Collins.....	281	Grand Trunk R. Co. v. Fitzgerald.....	12
Cushing v. Fortin.....	355	Grand Trunk R. Co. v. Sibbald.....	158
		Grand Trunk R. Co. v. Tremayne.....	158
		Grant v. Reginam.....	165
		Great North Western Telegraph Co. & Lawrance.....	34
Daoust v. Canadian Pacific R. Co....	282	Green v. Minnes.....	140
Dalglish v. Bond.....	93	Griffith v. Canadian Pacific R. Co....	119
Daveluy & La Société Canadienne Fran- çaise de Construction.....	162	Groulx v. Wilson.....	355
Davies v. Hennessy.....	8	Guardian Assurance Co. v. Connely....	113
Dawson v. Dumont.....	39	Guy v. Paré.....	307
DeKuyper v. Van Dulken, Wieland & Co.....	357		
Dominion Salvage & Wrecking Co. v. Brown.....	104	Halton Election—Lush v. Waldie.....	57
Dominion Salvage & Wrecking Co. & Atty. General.....	276	Hasson v. Wood.....	140
Dorion v. Dorion.....	169	Hathaway v. Chaplin.....	197
Dubois v. Corporation de Ste. Rose....	277	Hoborn v. Fowler.....	344
Duggan v. London & Canadian Loan Co.....	202	Hoggan v. Esquimaux & Nanaimo R. Co.....	168
Duncan v. Canadian Pacific R. Co....	16	Holland v. Ross.....	43
		Holm v. Holm.....	235
		Hoskins v. Corfield.....	248

TABLE OF CASES.

v.

Houghton v. Bell.....	157	McNaughton & Exchange National Bank.....	15
Howard v. O'Donohue.....	20	McVey & McVey.....	92
Humphrey v. Reginam.....	198	Merchants Bank of Canada & Cunningham.....	50
Huntingdon v. Attrill.....	97	Miller v. Duggan.....	155
Hurtubise v. Desmarteau.....	40	Moir v. Corporation of Village of Huntingdon.....	6
Hus v. Commissaires d'Ecoles de Ste. Victoire.....	41	Mongenais & Allan.....	130
		Morin v. Reginam.....	197
Illinois Central R. Co. v. City of Chicago.....	65	Municipality of South Dufferin v. Morden.....	18
Imperial Loan Co. v. Stone.....	127	Montgomery v. Montgomery.....	48
		Municipality of Cornwallis v. Canadian Pacific R. Co.....	54
Jetté & Crevier..	177	Municipality of Lunenburg v. Attorney-General of N.S.....	213
King's County Election—Borden v. Berteaux.....	7	Municipality of Morris v. London & Canadian Loan Co.....	56
Kingston & Bath Road Co. v. Campbell.....	201	Murphy v. Reginam.....	356
Lacoste v. Wilson.....	164	New Westminster v. Brighthouse.....	206
Laprairie Election Case—Gibeault v. Pelletier.....	102	North British & Mercantile Ins. Co. v. McLellan.....	289
L'Assomption Election Case.....	195	Northfield v. Lawrance.....	324
Lavoie v. Lacroix.....	66	North Perth Election Case.....	114
Lavoie v. Reginam.....	358	North Perth Election Appeal—Campbell v. Grieve.....	152
Legault v. Legault.....	354		
Lisgar Election—Collins v. Ross.....	7	O'Connor & Inglis.....	32
L'Islet Election Case.....	136	O'Donohoe v. Beatty.....	20
Lush v. Waldie.....	57	Ooregum Gold Mining Co. of India.....	128
Lynch v. North West Canada Land Co.....	18	Ontario Bank v. Chaplin.....	100
		O'Shaugnessy v. Ball.....	371
Magor & Kehler.....	34		
Martial v. Reginam.....	357	Paradis v. Bossé.....	373
McBean & Marshall.....	38	Parker & Langridge.....	50
McCombe v. Phillips.....	38	Peers v. Elliott.....	203
McCulloch v. Barclay.....	142	People's Bank of Halifax v. Johnson..	214
McDonald v. McDonald.....	156	Penman Mfg. Co. v. Broadhead.....	292
McDougall v. Cameron.....	380	Perodeau v. Jackson.....	369
McGugan v. McGugan.....	218	Perry v. Cameron.....	10
McGugan v. Smith.....	218	Peters v. Quebec Harbor Commissioners.....	52
McKean v. Jones.....	53		
McLennan v. Chisholm.....	9		
McMicken v. Ontario Bank.....	204		

Petry v. Caisse d'Economie.....	52	Sherbrooke Gas & Water Co. & Corporation of City of Sherbrooke.....	22
Pike River Mills Co. v. Priest.....	360	Ship "Quebec".....	172, 199
Poirier v. Brulé.....	116	Simonds v. Chesley.....	118
Pontiac Election Case.....	212	Sise v. Pullman Palace Car Co.....	51
Prescott Election Case — Proulx v. Fraser.....	108	Slaughter v. Brown.....	248
Prince County Election — Perry v. Cameron.....	10	Smith v. McLean.....	377
Proulx v. Fraser.....	108	Société Canadienne Française v. Daveluy.....	166
Quebec Bank & Bryant et al.....	96	Spalding v. Ewing.....	229
Quebec etc. R. Co. v. Mathieu.....	42	Stanstead Election—Rider v. Snow....	8
Quebec Gas Co. v. City of Quebec.....	150	State v. Kingsley.....	237
Queen's County Election—Davies v. Hennessy.....	8	Stephens & Gillespie.....	58
Quirt v. Reginam.....	55	Stephens v. McArthur.....	106
Read v. Anderson.....	144	St. John v. Christie.....	203
Regina v. Arent.....	38	Sydney & Louisburg R. Co. v. Sword..	278
“ v. Bourdeau.....	15	Tourville & B. A. Assurance Co.....	108
“ v. Connolly.....	141	Township of Sombra v. Town of Chatham.....	291
“ v. Davidson.....	251	Treimblay v. Bernier.....	373
“ v. Harper.....	179	Trester & C.P.R. Co.....	35
“ v. Labrie.....	31	Turcotte & Whelan.....	37
“ v. Martin.....	149	Turgeon v. Wurtele.....	142
“ v. Micklethwaite.....	347	Turnbull v. Travellers' Insurance Co..	370
“ v. Neill.....	329	Utterson Lumber Co. v. Rennie.....	199
“ v. Ring.....	224	Vaughan v. Richardson.....	377
“ v. Russett.....	266	Venables v. Baring.....	234
“ v. Smith.....	347	Waddington v. Esquimaux & Nanaimo R. Co.....	168
Rider v. Snow.....	8	Walbank & Protestant Hospital for the Insane.....	14
Richelieu Election Case.....	374	Walker v. Baird.....	245
Rimmer v. London & North-Western R. Co.....	366	Welland Election Appeal—German v. Rothery.....	153
Robinson v. C.P.R. Co.....	209, 257, 259	Western Assurance Co. v. Ontario Coal Co.....	381
Rodier v. Lapierre.....	277	Whelan v. Ryan.....	104
Ross v. Barry.....	11	Williams v. Township of Raleigh.....	279
Rouville Election Case.....	196	Wineberg v. Hampson.....	6
Rural Municipality of Cornwallis v. C.P.R. Co.....	54	Woods vs. Reginam.....	32
Schiller v. Schiller.....	355		
Scott & McCaffrey.....	145		
Scott v. Bank of New Brunswick.....	217		
Scott v. Brown.....	248		
Scott's Estate.....	191		

•

THE LEGAL NEWS.

VOL. XV.

JANUARY 2, 1892.

No. 1.

CURRENT TOPICS AND CASES.

The year 1891 upon the whole dealt kindly with the members of the profession in this province. So few were the gaps made by death that the year contrasts very favourably with some of those which our readers are able to recall. As regards the bench, with one notable exception, there has been no change occasioned by death. In the Superior Court the only change was that involved in the resignation of Mr. Justice M. Doherty, and the appointment of his son in his place. The Chief Justice of this Court, whose judicial service counts more than a quarter of a century, still occupies his accustomed place, forming one of the most prominent and important links of the present with the past. Our recollections of things legal in Montreal take us back over thirty-two years, and at that time also the present Chief Justice was a prominent figure. He was then Crown Prosecutor, conducting the entire Crown business in both French and English. Mr. Justice Aylwin was on the bench. The late Judge Drummond, Edward Carter, B. Devlin, and Judge T. J. J. Loranger were usually of counsel for the defence. Without any disparagement of the counsel of the present day it may be said that the proceedings were then characterized by learning, dignity and decorum seldom equalled since.

In the Court of Queen's Bench, or the Court of Appeal as it is usually termed, the year 1891 has brought one of those considerable changes which seem to occur about every fifteen years. We have witnessed three of them. First, we recall Chief Justice Lafontaine with Justices Aylwin, Duval and Meredith sitting on either hand. The late Mr. Justice Caron, another member of the Court, was then engaged on the Codification Commission. Later we had Chief Justice Duval with Aylwin for a time, and Caron, Drummond, Badgley and Monk. The next principal group was composed of the late Chief Justice Dorion, with Justices Monk, Tessier, Ramsay and Sanborn. Justices Cross, Baby, Church and Bossé entered at later stages, as vacancies occurred, and an increase was made in the number of judges, from five to six. But in 1891 there came an extensive change. Chief Justice Dorion was removed by death. Mr. Justice Tessier retired after a lengthened service. Mr. Justice Church has also been obliged to retire owing to ill-health. The resignation of Mr. Justice Cross will probably occur soon. So that from the new year a new bench will practically be at work.

Three of the judges of the Montreal district, Justices Jetté, Baby and Davidson, were withdrawn from the Courts in September last, for the purposes of a Royal Commission. The task was one which few judges would undertake without extreme reluctance. Only the consideration that they were performing an important public duty could overcome the repugnance to such work. It is therefore all the more to be regretted that the treatment accorded to these judges since the completion of their task is far from being an encouragement to their colleagues to assume similar duties. A certain amount of vituperation, in matters pertaining to politics, seems to be inevitable. It was so in England in the case of the Parnell Commission, even with a president so greatly distinguished and esteemed as Lord Hannen. And after all, intelligent per-

sons have ceased to lend an ear to attacks of this sort. But the attacks are none the less unworthy, and it will not be long before their authors are ashamed of them. It should not be overlooked, however, that the counsel engaged before the Commission, were very far from countenancing the charges formulated by the press. Mr. Béique, Q. C., at the close of the proceedings, expressed himself as follows :—

“ Before this last sitting rises I and my colleague, Mr. Amyot, consider it to be our duty to state publicly that from the first to the last, in the conduct of this enquiry, your Honors have not ceased for one instant to give a great example of justice. Many apprehended that on account of the political passions which an enquiry of this kind was calculated to excite, the Bench, of which your Honors are worthy representatives, might find its high reputation for impartiality somewhat lessened ; but I am happy to say—and I know that in so doing I voice the general opinion—that, thanks to your mode of procedure, all fears of this nature were quickly dissipated. In fact, you so acted throughout as to make everyone forget that the matter in dispute was political. But for all that the action of the Commission was none the less energetic, and it is admitted by all that it has brought out all the facts and circumstances entering into the scope of this enquiry. On our side, we think we can take the credit of not having been an obstacle to a thorough enquiry. On the contrary, we favored it as much as lay in our power. ”

Mr. Amyot congratulated the Montreal Bar on having sent such worthy representatives as Messrs. Béique, Q. C., and Hall, Q. C., and the proceedings were closed by Mr. Justice Davidson, in a few words which deserve to be recorded :—

“ I add but a word to express our high appreciation and gratification for the assistance afforded us by the learned and able counsel who have appeared before the Commission. We desire to express our thanks for the gratifying remarks with which they have ended their labors. We feel that we would be unworthy exponents of that principle of our constitution which separates the judicial function from the warfare of parties, and that we would be unworthy of our position as British judges if we were not able to approach an enquiry of this character without prejudice, to conduct it without bias, and to determine it without favor. ”

A CONSTITUTIONAL QUESTION.

A number of opinions have been published recently concerning a question of great interest, viz., the interpretation of sections 85 and 86 of the B.N.A. Act. Section 86 reads as follows: "There shall be a session of the legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the legislature in each province in one session and its first sitting in the next session." The last session of the Quebec legislature came to an end December 30, 1890. The legislature was convoked (though not for the dispatch of business) for the 29th December, 1891. But on the 22nd December the legislative assembly was dissolved, and a new election being necessary, the session was deferred until April 7, 1892. It is unfortunate, as regards the weight accorded to lawyers' opinions, that in matters political they almost invariably take the view which suits their party; otherwise, we presume they would be suppressed altogether. But this fact gives them the air of having been manufactured to order, and they have no more weight than an ordinary political statement. One opinion has been emitted, however, by a gentleman whom the *London Times*, a few days ago, described as the highest living authority,— we refer to Dr. Bourinot, Clerk of the House of Commons. This opinion deals so fairly with the merits of the question, in its purely legal aspect, that we insert it here as a useful and interesting precedent.

"My consideration of the important and novel question involved in the dissolution of the Quebec legislature leads me to the conclusion that the Crown, as represented by the lieutenant-Governor, has a right to exercise its constitutional prerogative of dissolution at any moment under the law of the constitution. The 85th and 86th sections of the B. N. A. Act, when read together, as they clearly must be, provide for a meeting of the legislature every year within the term of five years that the Quebec Assembly may last, subject to be dissolved by the lieutenant-Governor of the province any time within a year. Even were we to take

the 86th section by itself, which I do not think should be done, the prerogative right of the Crown to dissolve would, nevertheless, still exist. The right of dissolving at any moment when it is believed the public interests demand it, cannot be taken away, any more than any other prerogative by implication, but only by express terms. In my opinion, however, this right is expressly acknowledged in the sections of the constitutional Act relating to the meeting and duration of the Assembly. In any case no legal or constitutional rights can be prejudicially affected so far as I can see at present, supposing the 86th section were imperative on the Crown—which, in my opinion, it is not—to call the legislature within twelve months. The right of the Crown to dissolve at its discretion is one of its most important prerogatives, absolutely essential, under our system of popular government, to give the people an opportunity of expressing their opinion on any great question at issue, and deciding at critical times between parties contending for the supremacy. It lies at the very basis of free institutions.

“Dicey, the highest English authority on such questions, has truly said that the discretionary power of the Crown occasionally may be, and according to constitutional precedents sometimes ought to be, used to strip an existing representative assembly of its authority. A dissolution is, in its essence, an appeal from the legal to the political sovereign—that is, to the electorate. A dissolution is allowable, and in fact is necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the people. The earliest possible opportunity should be given to the people to express their opinions when the issues are vital and cannot be otherwise satisfactorily and definitely decided.”

SUPREME COURT OF CANADA.

Quebec.]

CORPORATION OF THE COUNTY OF VERCHÈRES V. CORPORATION OF THE VILLAGE OF VARENNES.

Jurisdiction—Action to set aside a procès-verbal or by-law—Appeal—Sec. 24 (g) and sec. 29 of the Supreme & Exchequer Courts Act.

The Municipality of the County of Verchères passed a by-law or procès-verbal, defining who were to be liable for the rebuilding and maintenance of a certain bridge. The Municipality of Varennes, by their action, prayed to have the by-law or procès-verbal in question set aside on the ground of certain irregularities.

On appeal to the Supreme Court;

Held, that the case was not appealable under sec. 29 or sec. 24 "g" of the Supreme and Exchequer Courts Act, the appeal not being from a rule or order of a court quashing or refusing to quash a by-law of a municipal corporation.

Appeal quashed with costs.

Allan for appellant.

Archambault, Q.C., for respondent.

Quebec.]

WINEBERG *et vir* v. HAMPSON.

Jurisdiction—Appeal—Future rights—Title to lands—Servitude—Supreme & Exchequer Courts Act, sec. 29 (b)

By a judgment of the Court of Queen's Bench for Lower Canada (Appeal side) the defendants in the action were condemned to build and complete certain works and drains in a lane separating the defendants' and plaintiff's properties on the west side of Peel Street, Montreal, within a certain delay, and the court reserved the question of damages. On appeal to the Supreme Court of Canada,

Held, that the case was not appealable. *Gilbert v. Gilman* (16 Can. S. C. R. 189) followed.

The words "title to lands" in subsec. "b" sec. 29, Supreme and Exchequer Courts Act, are only applicable in a case where a title to the property or a right to the title are in question. *Wheeler v. Black* (14 Can. S. C. R. 242) referred to.

Appeal quashed with costs.

Bethune, Q.C., for motion.

Robertson, Q.C., contra.

Quebec.]

MOIR v. CORPORATION OF THE VILLAGE OF HUNTINGDON *et al.*

By-law—Appeal as to costs—Supreme & Exchequer Courts Act, sec. 24.

Since the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the Corporation of the Village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada,

Held, that the only matter in dispute between the parties being a mere question of costs, the appeal should be dismissed. Supreme and Exchequer Courts Act, sec. 24.

Appeal dismissed with costs.

R. C. Smith, for motion.

Mitchell, and *D. C. Robertson*, contra.

Nova Scotia.]

KING'S COUNTY ELECTION.

BORDEN V. BERTEAUX.

Election petition—Preliminary objections—Service at domicile—R. S. C. ch. 9, sec. 10.

Held, that leaving a copy of an election petition and accompanying documents at the residence of the respondent with an adult member of his household during the five days after the presentation of the same is a sufficient service under sec. 10 of the Dominion Controverted Elections Act, even though the papers served do not come into the possession or within the knowledge of the respondent.

Appeal dismissed with costs.

Roscoe for appellant.

Boak for respondent.

Manitoba.]

LISGAR ELECTION.

COLLINS V. ROSS.

Election Petition—Preliminary objections—R. S. C. ch. 9, s. 63—English General rules—Manitoba—Copy of petition—R. S. C. ch. 9, sec. 9 (h)—Description and occupation of petitioner.

Held, affirming the judgment of the Court below, that the judges of the Court in Manitoba not having made rules for the practice and procedure in controverted elections, the English rules of Michaelmas Term, 1868, were in force; R. S. C. ch. 9, sec. 63; and that under rule 1 of said English rules, the petitioner, when filing an election petition is bound to leave a copy with the clerk of the court, to be sent to the returning officer, and that his failure to do so is the subject of a substantive preliminary objection and fatal to the petition. Strong & Gwynne JJ. dissenting.

2. Reversing the judgment of the Court below, that the omission to set out in the petition the residence, address and occupation of the petitioner is a mere objection to the form which can be remedied by amendment, and therefore not fatal.

Appeal dismissed with costs.

Martin for appellant.

D. McCarthy, Q.C., for respondent.

P. E. Island.]

QUEEN'S COUNTY ELECTION.

DAVIES AND WELSH V. HENNESSY.

Election Petition—Preliminary objections—Personal service at Ottawa—Security—Receipt—R. S. C. ch. 9, secs. 8 & 9, subsecs. (e) and (g) and sec. 10.

In Prince Edward Island two members are returned for the Electoral District of Queen's County. With an election petition against the return of the two sitting members, the petitioner deposited the sum of \$2,000 with the deputy prothonotary of the Court, and in his notice of presentation of the petition and deposit of security he stated that he had given security to the amount of \$1,000 for each respondent, "in all two thousand dollars duly deposited with the prothonotary as required by statute." The receipt was signed by W. A. Weeks, the deputy prothonotary appointed by the Judges, and acknowledges the receipt of \$2,000, without stating that \$1,000 was deposited as security for each respondent. The petition was served personally on the respondents at Ottawa.

Held, 1. That personal service of an election petition at Ottawa, without an order of the court, is a good service under section 10 of the Controverted Elections Act.

2. That there being at the time of the presentation of the petition security for the amount of \$1,000 for the costs of each respondent under the control of the court, the security given was sufficient. Secs. 8 and 9 subsec. "e". Ch. 9, R. S. C.

3. That the payment of the money to the deputy prothonotary of the court at Charlottetown was a valid payment. Sec. 9, subsec. (g) Ch. 9, R. S. C.

Appeal dismissed with costs.

Peters, Q. C., for appellants.

W. A. Morson for respondent.

Quebec.]

STANSTEAD ELECTION.

RIDER V. SNOW.

Election Appeal—Preliminary Objections—Status of petitioner—Onus probandi.

By preliminary objections to an election petition the respondent claimed that the petition should be dismissed *inter alia*,

"14. Because the said petitioner had no right to vote at said election."

On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence, and the preliminary objections were dismissed. On appeal to the Supreme Court of Canada, the counsel for appellant relied only on the 14th objection.

Held, Per Sir W. J. Ritchie, C.J., and Taschereau and Patterson, JJ., that the onus was upon the petitioner to establish his status, and that the appeal should be allowed and the election petition dismissed.

Per Strong, J., that the *onus probandi* was upon the petitioner, but in view of the established jurisprudence should be remitted to the court below to allow petitioner to establish his status as a voter.

Fournier and Gwynne, JJ., *contra*, were of opinion that the *onus probandi* was on the respondent, following the *Megantic Election case*, 8 Can. S. C. R. 169.

Appeal allowed with costs, and petition dismissed.

Geoffrion, Q. C., for appellant.

White, Q. C., for respondent.

Ontario.]

GLENGARRY ELECTION.

McLENNAN V. CHISHOLM.

Election petition—Re-service of—Order granting extension of time—Preliminary objections—R. S. C. ch. 9, sec. 10—Description of petitioner.

When this petition was first served no copy of the deposit receipt was served with it, and the petitioner within the five days after the day on which the petition had been presented applied to a Judge to extend the time for service so that he might cure the omission. An order extending the time, (subsequently affirmed on appeal by the Court of Appeal for Ontario), was made, and the petition was re-served accordingly with all the other papers prescribed by the Statute. Before the order extending the time had been drawn up, the respondent had filed preliminary objections, and by leave contained in the order he filed further preliminary objections after the re-service. The new list of objections included those made in the first instance, and also an objection to the power or jurisdiction in the Court of Appeal or Judge thereof to extend the time for service of the petition beyond the five days prescribed by the Act.

Held, that the order was a perfectly valid and good order, and that the re-service made thereunder was a proper and regular service. R. S. C., ch. 9, sec. 10.

The petition in this case simply stated that it was the petition of Angus Chisholm of the township of Lochiel, in the County of Glengarry, without describing his occupation, and it was shown by affidavit that there are two or three other persons of that name on the voters' list for that township.

Held, affirming the judgment of the Court below, that the petition should not be dismissed for the want of a more particular description of the petitioner.

Appeal dismissed with costs.

D. McCarthy, Q.C., for appellant.

S. Blake, Q.C., for respondent.

CONTROVERTED ELECTIONS FOR THE ELECTORAL DISTRICTS OF
PRINCE COUNTY, P. E. I. (PERRY and YEO v. CAMERON);
SHELBURNE, N. S. (WHITE v. GREENWOOD);
ANNAPOLIS, N. S. (MILLS v. RAY);
LUNENBURG, N. S. (KAULBACH v. BISENHAUER);
ANTIGONISH, N. S. (THOMPSON v. MACGILLIVRAY);
PICTOU, N. S. (TUPPER v. MCCOLL);
INVERNESS, N. S. (MCDONALD v. CAMERON).

*Election Petitions—Preliminary objections—Service of petition—
Security—R. S. C. ch. 9, sec. 10, and sec. 9 (e) and (g).*

In all these cases the appeals were from the decisions of the Courts below dismissing preliminary objections to the election petitions presented against the appellants.

The questions raised on these appeals were also 1st. Whether a personal service on the respondent at Ottawa without or with an order of the Court at Halifax or at his domicile is a good service. 2nd. Whether the payment of the security required by sec. 9 (e) into the hands of a person who was discharging the duties of and acting for the prothonotary at Halifax, and a receipt signed by said person in the prothonotary's name, sec. 9 (g) were valid. The Court, following the conclusion arrived at in the King's County (N.B.) & Queen's County (P. E. I.) Election cases,

held the service and payment of security were valid and a substantial compliance with the requirements of the Statute.

Appeals dismissed with costs.

Prince County P. E. I.

Peters, Q. C., for appellants.

Morson, for respondent.

Annapolis, N. S.

Shelburne, N. S.

Lunenburg, N. S.

Antigonish, N. S.

Pictou, N. S.

Inverness, N. S.

McCarthy, Q.C., & J. A. Ritchie, for
appellants.

G. T. Congdon for respondents.

Ontario.]

ROSS V. BARRY.

Contract—Construction of railway—Standard of quality—Evidence.

McC. and R. were the contractors for the construction of a part of the Grand Trunk Railway, and sublet the masonry work to B. & S. In a conversation between McC. and S. before B. & S. began their work, S. understood that the second class masonry in his contract was to be of the quality of that of the "Loop line", another part of the Grand Trunk Railway road, and prepared his materials accordingly on receipt of a letter from McC. instructing him to carry out his contract "according to the plans and specifications furnished by the company's engineer". After a small portion of the masonry work had been done the sub-contractors were informed by the engineer in charge that the second class masonry required was of a quality that would increase the cost over 30 per cent, whereupon they refused to proceed until McC. who was present said to them, "go on and finish the work as you are told by the engineer, and you will be paid for it." They thereupon pulled down what was built and proceeded according to the directions of the engineer. When the work was nearly done McC. tried to withdraw his promise to pay the increased price, but renewed it on the sub-contractors threatening to stop. After completion of the work payment of the extra price was refused, and an action was brought therefor.

Held, affirming the judgment of the Court of Appeal, that the conversation between McC. and S. prior to the commencement of the work, as detailed in the evidence, justified the sub-contractors in believing that the standard of quality was to be that of the Loop line; that the promise to pay the increased price was in

settlement of a *bona fide* dispute, which was a good consideration for such promise; and that B. and S. were entitled to recover.

Appeal dismissed with costs.

Bain, Q. C., and Laidlaw, Q. C., for appellants.

Osler, Q. C., for respondents.

Ontario.]

GRAND TRUNK RAILWAY CO. V. FITZGERALD.

Railway Company—Construction of line under charter—Money advanced and control exercised by another company—Liability of latter as to it—Tort-feasor.

In an action by F. against the G. T. Ry. Company for damages caused by the building of an embankment along a line of railway which cut off access to the highway from F.'s land, the company contended that the said line of railway was built by and under the charter of another company: that there was no statute authorizing the G. T. R. Company to build it, and its construction by them would be *ultra vires*; and that even if the officers of the G. T. R. Company were also officials of the company constructing said line, and F. had sustained damage by its construction, the G. T. R. Company as a corporation could not be made liable therefor. On the trial the evidence showed that the G. T. R. Company had advanced the money to build the line; and its president and other directors owned nearly all the stock in the chartered company, and that the work was done under the control and direction of the G. T. R. Company's engineers.

Held, affirming the decision of the Court of Appeal, that the G. T. R. Company were liable to F. as wrongdoers.

Appeal dismissed with costs.

W. Cassels, Q. C., for appellants.

Edwards for respondents.

Manitoba.]

BARRETT V. THE CITY OF WINNIPEG.

Constitutional law—Constitution of Manitoba—33 Vict. c. 3 (D.)—Act respecting education—Denominational rights—Separate schools.

The Act by which the Province of Manitoba became a part of the Dominion of Canada, 33 V. c. 3 (D.), gave to the Province the exclusive right to legislate in respect to education with the following limitation: "Provided that nothing in such law (a law relating to education) shall prejudicially affect any right or privilege with respect to denominational schools which any class of

persons has by law or practice in the Province at the Union." The words "or practice" are an addition to, and the only deviation from the words of the like provision in the B. N. A. Act under which *Ex parte Renaud* (1 Pugs. 273) was decided in New Brunswick.

In 1871, after the said Union, an Act relating to schools was passed by the legislature of Manitoba, by which the control of educational matters was vested in a Board consisting of an equal number of Protestants and Catholics. A Protestant and a Catholic superintendent of education was to be appointed, and Protestant and Catholic school districts established, the legislative grant for schools to be apportioned to each. This Act was amended from time to time, but the system it established continued until 1890.

By 53 Vict. c. 38, passed by the legislature in 1890, a system of public schools was established in the Province, the former system was abolished, the control of educational matters was vested in a Department of Education, consisting of a committee of the Executive Council, and all the schools were to be free and no religious exercises to be allowed except as authorized by the advisory boards to be established under the provisions of the Act. The ratepayers of the several municipalities were to be indiscriminately taxed for the support of the public schools.

A Catholic ratepayer of the City of Winnipeg moved to quash by-laws passed to impose a tax for school purposes, and in support of his motion an affidavit of the Archbishop of St. Boniface was read, setting forth the position of the Roman Catholic Church with respect to education and the control it always exercised over the same, and showing that prior to the admission of Manitoba into the Union, Catholics had their own schools, partly supported by fees from parents and partly by the funds of the church.

Held, reversing the judgment of the Court of Queen's Bench, Manitoba, (7 Man. L. R. 273) that this Act 53 Vict. c. 38, prejudicially affected the rights and privileges with respect to denominational schools which Roman Catholics had by practice in the Province at the Union, and was therefore *ultra vires* of the provincial legislature. *Ex parte Renaud* (1 Pugs. 273) distinguished.

Appeal allowed with costs.

S. H. Blake, Q.C., and *Ewart, Q.C.*, for appellant.

Gormully, Q.C., and *Martin* for respondents.

COURT OF QUEEN'S BENCH—MONTREAL.*

Architect—Submission of Plans—Contract—Damages.

The plaintiff, an architect, in response to a public advertisement, offered plans in competition for a building about to be erected by the defendant, on being assured by the president of defendant's board that all the plans sent in would be submitted to disinterested experts before a choice was made. The plans were not submitted to experts, and those finally adopted were submitted by an architect who was not a competitor within the terms of the public advertisement.

Held:—That the plaintiff was not entitled to damages, it being admitted that the defendant was not bound to adopt the plans which might be recommended by the experts, and no partiality or bad faith in the selection being proved.—*Walbank & Protestant Hospital for the Insane*, Lacoste, C.J., Baby, Bossé, Wurtele, JJ., Nov. 26, 1891.

Physician—Proof of services—C. C. 2260; 32 Vic. (Q), c. 32, s. 1—R. S. Q. 5851.

Held:—That the oath of the physician or surgeon, which, under R. S. Q. 5851, makes proof as to the nature and duration of the services, can only be rebutted by the clearest and most precise testimony; which was not found by the Court in the present case, in which, by the evidence of doctors who had not seen the patient before or during the illness, and who did not speak positively, it was sought to reduce a physician's account, for treating a case of fracture of the collar bone, from \$175 to \$100.—*Bourgeau & Brodeur*, Lacoste, C.J., Bossé, Blanchet, Wurtele and Tait, JJ., Nov. 27, 1891.

Criminal Procedure—Reserved Case—Amendment—Notice to prisoner to produce document—Verbal evidence.

Held:—1. That a Reserved Case will not be sent back to be amended by the judge who reserved it; upon the mere allegation of the prisoner or his counsel that the facts are not accurately stated therein.

2. That a prisoner is not entitled to complain of short notice to produce a document at his trial, where it is shown that the document in question was in the possession of a person under the control of the prisoner and his counsel on the day of the trial.

* To appear in Montreal Law Reports, 7 Q.B.

3. That the prisoner having in the circumstances declined to produce the document, secondary evidence was admissible.—*Regina v. Bourdeau*, Lacoste, C.J., Bossé, Blanchet, Wurtele and Tait, JJ., Nov. 27, 1891.

Unpaid Vendor—Privilege of—Opposition to sale of immovable seized—Art. 657, C. C. P.—Shareholder—Company.

Held:—1. The privilege of *bailleur de fonds* does not give the unpaid vendor the right of opposing the seizure and sale of the immovable subject to it.

2. The unpaid vendor is not entitled to ask for the rescission of the sale of an immovable unless there be a stipulation to that effect in the contract of sale.

3. A shareholder of a company is not entitled to exercise the rights of the company in his own name, and cannot oppose the sale of an immovable belonging to the company.

4. A promise of retrocession by the majority of the shareholders of a company is null, the company alone having the power to make such an agreement.—*McNaughton & Exchange National Bank*, Lacoste, C.J., Baby, Bossé, Wurtele, JJ., Nov. 27, 1891.

Injunction—To prevent encroachment—Boundaries not determined—Bornage.

Held:—That the remedy by writ of injunction does not lie where another adequate remedy exists; and so, in the case of a dispute between adjoining proprietors of mining lands, where an encroachment is complained of, and it appears that the limits of the respective properties have not been legally determined by a *bornage*, an injunction will not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage*.—*Anglo-Continental Guano Works & Emerald Phosphate Co.*, Lacoste, C.J., Baby, Bossé, Wurtele, JJ., Nov. 26, 1891.

ONTARIO DECISIONS.

Railway company—Horses killed—53 Vict. (D.) c. 28, s. 2.

Three horses got upon the defendants' line of railway from adjoining premises, where they had no right to be, and were killed. In an action of damages for their loss,

Held, following *Davis v. Canadian Pacific R. Co.*, 12 A. R. 724, that the words "under the circumstances it might properly be" in 53 Vict. (D.) c. 28, s. 2, mean "it might lawfully

be"; and that as the horses were not on the adjoining premises with the consent of the owner or occupant, they were not "lawfully" there.

Held, also, that although the owner did not object to their being there, still as there was no by-law of the municipality permitting them to run at large, they could not be held to have been properly there; and the action was dismissed with costs.—*Duncan v. Canadian Pacific R. Co.*, MacMahon, J., Chancery Division, Toronto, Aug. 15, 1891.

INSOLVENT NOTICES ETC.

Quebec Official Gazette, Dec. 26 & Jan. 2.

Judicial Abandonments.

DUBUC & Co. (Marie Rose Emilia Gélinas), Drummondville, Dec. 19.
 FOREST, GEORGE, parish of Bonaventure, Dec. 16.
 GAUVREAU & Co., cement manufacturers, Quebec, Dec. 23.
 GORDON & HOWIE, traders, Beebe Plain, Dec. 21.
 LANGLOIS, JOSEPH, trader, St. Scholastique, Dec. 18.
 MORRIER, DELVECCHIO, Capelton, township of Ascot, Dec. 15.
 TOUCHETTE, JOSEPH *alias* ZOZIME, St. Paul d'Abbotsford, Dec. 24.
 VANANDAGNE dit GADBOIS, ANDRE, St. Ephrem d'Upton, Dec. 28.

Curators Appointed.

BILODEAU & GODBOUT, Quebec.—H. A. Bedard, Quebec, curator, Dec. 21.
 BOA, ANDREW.—J. M. M. Duff, Montreal, curator, Dec. 29.
 BOIVIN, GEORGES, shoedealet, Quebec.—N. Matte, Quebec, curator, Dec. 24.
 CHAMPOUX, JOSEPH, Joliette.—D. Seath and A. Turcotte, Montreal, joint curator, Dec. 28.
 GAGNÉ, ONÉSIME, Sorel.—Kent & Turcotte, Montreal, joint curator, Dec. 15.
 LANGLOIS, JOSEPH, Ste. Scholastique.—D. Seath, Montreal, curator, Dec. 29.
 LOISEAU, J. E. A.—Bilodeau & Renaud, Montreal, joint curator, Dec. 29.
 MARTIN, ARTHUR J.—Bilodeau & Renaud, Montreal, joint curator, Dec. 29.
 MORRIER, DELVECCHIO. — Royer & Burrage, Sherbrooke, joint curator, Dec. 29.
 PORTELANCE & Co., VICTOR.—G. H. Burroughs, Quebec, curator, Dec. 28.
 VINEBERG, J. LYON, Sherbrooke.—Kent & Turcotte, Montreal, joint curator, Dec. 29.

THE LEGAL NEWS.

VOL. XV.

JANUARY 16, 1892.

No. 2.

CURRENT TOPICS AND CASES.

Mr. Justice Church, whose resignation has been caused by ill-health, was appointed a judge of the Court of Queen's Bench just five years ago, to fill the place of the late Mr. Justice Ramsay. His term of office, brief as it has been, was greatly encroached upon by ill-health. After several interruptions of work caused by sickness, the learned judge was attacked two years ago by the prevailing influenza, and although he was able for a short time to resume his duties, the effort apparently proved too much for him. It is to be regretted that what bid fair to be a useful and satisfactory judicial career has been brought prematurely to an end.

Mr. Justice Church's successor is Mr. Robert Newton Hall, Q. C., of Sherbrooke. Mr. Hall was admitted to the bar in 1861. The firm of which he was the head, has long occupied a leading position at Sherbrooke. Mr. Hall himself has not appeared much in Court in recent years, but he is known in parliamentary and legal circles as an advocate of unusual ability, and there is reason to expect that he will win favor as a judge. Sherbrooke, it may be remarked, some years ago contributed a very

able member to the Court of Appeal in Judge Sanborn, whose decease was a great loss to the bench.

The January term of the Court of Appeal at Montreal opened with 118 cases on the printed list. This is apparently an increase of 32 cases over the January list of last year, when there were 86 cases inscribed. It is to be observed, however, that the change in procedure, effected by 54 Vict. c. 48, has led to the appearance of a good many cases on the paper which would not have been placed on it so soon under the old system. The list is formidable enough, and the fact that it still contains a few cases which are to be found on the list for January, 1891, shows the extent of the arrears. It is a curious fact, in the face of this long calendar, that the Court was obliged to adjourn on the 15th instant without hearing a single case, for the reason that there was not one in which the parties were prepared to go on. Of course, this happened because there was something which necessitated the postponement of the first case or two, and those who were lower down were not on hand to step into the vacant place. The same thing occurs constantly in every court in the world. A special term of the Court is to be held at Montreal, beginning Feb. 17.

SUPREME COURT OF CANADA.

Manitoba.]

LYNCH V. NORTH WEST CANADA LAND CO.

MUNICIPALITY OF SOUTH DUFFERIN V. MORDEN.

GIBBINS V. BARBER.

Constitutional law—B. N. A. Act, sec. 91—Interest—Legislative authority over—Municipal Act—Taxation—Additional rate for non-payment.

The Municipal Act of Manitoba (1886) sec. 626, as amended by 49 Vict. c. 52, provides that "in cities and towns all parties paying taxes to the treasurer or collector before the 1st day of December, and in rural municipalities before the 31st day

of December, in the year they are levied, shall be entitled to a reduction of 10 per cent. on the same, and all taxes remaining due and unpaid on the 1st or 31st day of December (as the case may be), shall be payable at par until the 1st day of March following, at which time a list of all the taxes remaining unpaid and due shall be prepared by the Treasurer or Collector (as the case may be), and the sum of 10 per cent. on the original amount shall be added on all taxes then remaining unpaid."

Held, reversing the judgment of the Court below, Gwynne, J., dissenting, that the addition of 10 per cent. on taxes unpaid on March 1st is only an additional rate or tax imposed as a penalty for default, and is not "interest" within the meaning of sec. 91 of the B. N. A. Act, and so within the exclusive legislative authority of the Dominion Parliament. *Ross v. Torrance* (2 Leg. News, 186) overruled.

Appeal allowed with costs.

SOUTH DUFFERIN v. MORDEN.

Martin, Attorney General, for appellants.

McTavish, Q.C., for respondent.

LYNCH v. NORTH WEST LAND CO.

Kennedy, Q.C., for appellant.

Robinson, Q.C., and *Tupper*, Q.C., for respondents.

GIBBINS v. BARBER.

Tupper, Q.C., for respondent.

Ontario.]

BRANTFORD, WATERLOO & LAKE ERIE RY. CO. v. HUFFMAN.

Contract — Tender for — Acceptance—Bond — Condition of—Consideration.

H., in response to advertisement therefor, tendered for a contract to build a line of railway, and his tender was accepted by the board of directors of the railway company subject to his furnishing satisfactory sureties for the performance of the work and depositing in the Bank of Montreal a sum equal to 5 per cent. of the amount of his tender. H. subsequently executed a bond in favour of the Railway company, which, after reciting the fact of the tender and acceptance, contained the condition that if within four days of the date of execution H. should furnish the said sureties and deposit the said amount the bond should be void. These conditions were not carried out and the contract was eventually given to another person. In an action against H. on the bond,

Held, affirming the decision of the Court of Appeal (18 Ont. App. R. 415), that no contract having been entered into pursuant to the tender and acceptance, the bond was only an agreement for which there was no consideration, and H. was not liable on it.

Appeal dismissed with costs.

Lash, Q.C., and *Wilson, Q.C.*, for appellants.

Osler, Q.C., and *Harley* for respondent.

Ontario.]

HOWARD v. O'DONOHUE.

Statute of Limitations—Possession—Caretaker—Acts of ownership.

F. H. was the acting owner of certain real estate for some years prior to 1865, and O. was in possession under him as caretaker. In 1865, in a suit between F. H. and other members of his family, a decree was made declaring F. H. to hold as trustee for, and to convey certain proportions of the property to, the other members. O. continued in possession after this decree, and took proceedings at different times against trespassers and others, but always represented that he did so by authority from F. H., and he did no act as asserting ownership in himself until 1884, when he fenced a portion of the land. In an action against O. to recover possession of the land,

Held, reversing the judgment of the Court of Appeal (18 Ont. App. R. 529), that the effect of the decree in 1865 was not to alter the relations between F. H. and O.; that O. having once entered as caretaker, and having never disclaimed that he held as such for the necessary period to gain a title by possession, his possession continued to be that of a caretaker and he could not retain possession of the land against the true owners. *Ryan v. Ryan* (5 Can. S. C. R. 387) followed.

Appeal allowed with costs.

McCarthy, Q.C., and *MacMurchy* for appellants.

Reeve, Q.C., for respondent.

Ontario.]

O'DONOHUE v. BEATTY.

Solicitor—Bill of costs—Proceedings before taxing officer—Evidence of settlement—Appeal.

The executors of an estate took proceedings to obtain from a solicitor of the testator an account and payment of monies in his hands due the estate. A reference was made to a taxing officer

to tax the bills of costs produced by the solicitor, and in doing so the officer, subject to protest by the solicitor, took evidence of an alleged settlement between the executors and the solicitor, by which a fixed amount was to be paid the latter in full of all claims. The officer having reported a considerable amount due from the solicitor to the estate the solicitor appealed, urging that the order of reference did not authorise the officer to do more than tax the bills, and in doing so, as they had been rendered more than a year before the proceedings commenced, they should be taxed at the amount represented on their face. The officer's report was affirmed by the Divisional Court and the Court of Appeal.

Held, affirming the decision of the Court of Appeal, that the taxing officer not only could but was bound to proceed as he did, and the appeal should be dismissed.

Quære: As the matter in question relates only to the practice and procedure of the High Court of Justice in Ontario, and the conduct of one of its officers in carrying out an order of the court, is it a proper subject of appeal to the Supreme Court of Canada?

Appeal dismissed with costs.

O'Donohoe appellant in person.

McCarthy, Q.C., for respondent.

Ontario.]

BICKFORD V. HAWKINS.

Appeal—Questions of fact—Interference with decision of trial judge.

In an action for payment of services alleged to be performed by H., on a retainer by B., to procure a subsidy from Parliament and bonuses from Municipalities of Sarnia and Sombra in aid of a railway projected by B., the giving of which retainer B. denied,

Held, that the question for decision being entirely one of fact, the decision of the trial Judge, who saw and heard the witnesses, in favour of H., confirmed as it was by the Court of Appeal, should not be interfered with by the Supreme Court.

Appeal dismissed with costs.

Lash, Q. C., for appellant.

McCarthy, Q. C., and *Wilson, Q. C.*, for respondent.

CIRCUIT COURT—DISTRICT OF ST. FRANCIS.

SHERBROOKE, Dec. 23, 1891.

Before TAIT, J.

SHERBROOKE GAS & WATER Co., appellant, and CORPORATION OF
THE CITY OF SHERBROOKE, respondent.

Immovable—Gas and water pipes.

Held:—*That pipes and mains laid throughout the streets of a city by a gas and water company, under the authority of an Act of the legislature, for the purpose of supplying gas and water to the inhabitants of the city, form part of the realty of the company and are taxable as real estate.*

TAIT, J.—This is an appeal from a decision of the municipal council of the city of Sherbrooke, homologating the valuation roll of said city for the present year, in which, in pursuance of two resolutions passed by the said council previous to such homologation, the valuations previously placed on two parcels of land belonging to appellants, one known as part of official lot 1239 in the South ward, and the other as part of official lot 571 of the North ward of said city, were increased from \$6,000 and \$8,000 to \$36,000 and \$78,000 respectively. The Gas works of appellants are erected on the first mentioned lot and the Water works on the other. The resolutions show, and it is admitted, that the \$30,000 increase represents the value of the gas mains and pipes, while the increase of \$70,000 represents the value put upon the water mains and pipes running through the streets of the city. The pretention of the appellants is that the gas mains and pipes are not placed upon lot 1239, nor the water mains and pipes upon lot 571; that they form no part of these respective lots, but have been placed throughout the streets of the city by the special permission and authority of the Legislature of this province for the purpose of supplying gas and water to the inhabitants of the city, and that they form no part of the real estate of the city, and are not taxable property. It is also said that the council arbitrarily valued these mains and pipes without any notice to the appellants, and without any action ever having been taken by the council or by the valuator to ascertain the value thereof.

The respondents deny the truth of the allegations set forth in the *moyens* of appeal, and, further, say that the gas mains and pipes and water mains and pipes which run through said streets, respectively attached to the gas and water works of appellants,

are taxable property, and are part and portion of the machinery connected with the working of said works, and form part and portion of the realty.

The grounds of objection to the increased valuation, based upon want of notice to appellants and failure of respondents or their valuers to ascertain the value of the mains and pipes, cannot, I think, be sustained. The public notice required by law was given on the 7th of August, 1891, of the deposit of the roll, and that the council would proceed on the 24th August to the examination and revision thereof. On that day a petition was presented by certain ratepayers, asking that the valuation of the property of the appellants be increased at least \$100,000. Meetings were held on the 26th and 28th, and on the latter occasion the valuers made a report referring to the value of the appellants' mains and pipes laid in the streets. Another meeting was held on the 31st, and then on the 4th September the resolutions objected to were passed and the roll was declared established and promulgated. Although this petition to increase appellants' valuation was before the council, as well as this report of valuation, no one appeared to represent the company. Mr. Griffith, secretary-treasurer of the city, says he verbally notified the appellants' secretary-treasurer on the 4th that the matter was coming up before the council that evening. This informal notice was going beyond the actual requirements of the law. It is perhaps true that in a matter of so much importance the council might perhaps have gone beyond this, and have sent in a more formal notice of the presentation of the petition and of the intention of the council to consider it, but I cannot say there was any legal obligation upon them to do so.

In arriving at the valuation of the mains and pipes the valuers and council appear to have been guided, to a considerable extent, by a report made in 1884 by Mr. Lesage, superintendent of the Montreal water works, upon the value of the appellants' water and gas works at that time. Of course, as this valuation had been made so many years ago, it only served as a basis or starting point for the present valuation. The valuers using it for that purpose and having certain other information, and exercising their own judgment, arrived at the conclusion that \$150,000 would be a low valuation for appellants' property and plant. The council, however, put the whole valuation at \$114,000—\$36,000 upon the gas property and \$78,000 upon the water property. I did not hear any evidence that would justify me in

saying that these valuations were made in bad faith or that they are erroneous, and I think they must be considered correct.

I therefore proceed to the consideration of the main question, whether the gas and water mains and pipes are taxable at all. This question has been argued with great ability by the learned counsel, and at first sight appeared to me to be one of considerable difficulty. The city is authorised by its charter (section 30) to levy taxes on all lands, city lots and parts of city lots, whether there be buildings erected thereon or not, with all buildings and erections thereon, a sum not exceeding two cents on the dollar on their whole value, as entered on the assessment roll of said city. By section 48 the provisions of the municipal code, when not inconsistent with the act of incorporation, apply to the city corporation, and whenever the latter is silent all the provisions of the code apply and are the law in relation to all municipal matters in said city. Article 719 of the code enacts that the actual value of the taxable real estate includes the value of all buildings, factories or machine shops erected thereon, and of any improvements which have been made thereto, save in so far as is set forth in the two following articles which refer to railway companies. This does not appear to me to add much to the words of the charter, which permits the levying of taxes on lands and all buildings and erections thereon. All property is either moveable or immoveable. The tax in question purports to be laid upon immoveables, the value of the gas and water mains and pipes having been included in the value of the lands and buildings. The question now to be decided is whether they really are part thereof, and liable to taxation as immovables. Art. 375 to 382 C. C., inclusive, deal with immoveables. We are told there are four kinds of immoveable property, and examples are given which are necessarily incomplete. These mains and pipes must be either immoveable by nature or by destination. Land and buildings and certain other things are mentioned as immoveable by their nature in articles 376, 377 and 378. Then art. 379 says: "Moveable things, which a proprietor has placed on his real property for a permanency, or which he has incorporated therewith, are immoveable by their destination so long as they remain there. Thus within these restrictions, the following and like objects are immoveable": Then follows a list, but of course it is not limitative. This is clear from the language of the article and the report of the commission who formally declare the enumeration incomplete, and all the commentators on the cor-

responding article of the Code Napoleon so speak of that article. The principles embodied in these articles extend, in their practical application, much further than one would imagine by casually reading them. A few citations from some of the leading authors will show this. Aubry & Rau, speaking of the immoveables by nature, says "Toutefois, comme la propriété du sol emporte celle " du dessus et du dessous, la loi range dans la classe des immeubles " par nature, en les opposant aux immeubles par destination, " tous les objets unis ou incorporés au sol. Tels sont les édifices " élevés au-dessus du sol, ainsi que les constructions faites au- " dessous, et tout ce qui en forme partie intégrante." While Demolombe (vol. 9, No. 103), speaking of what is comprised in the word "bâtiments," used in art. 518, C. N., corresponding with the word "buildings" in our article 376, says: "Il faut comprendre, " sous cette denomination de *bâtiments*, employée par l'article 518, " toutes constructions, tous travaux ou ouvrages quelconques, " superficiaires ou souterrains, quelles qu'en soient la matière, la " forme et la destination, dès que ces ouvrages sont incorporés " dans le sol, et en constituent une partie intégrante." Then again at No. 196 he says: "Parmi les éléments, en effet, qui " composent le *bâtiment*, il en est deux sortes: Les uns, qui sont " ses éléments intrinsèques, essentiels, constitutifs; ceux-là, ils " sont immeubles par leur nature, *pars ædium*, c'est le bâtiment " lui-même. Les autres, qui ne forment pas une partie aussi es- " sentiellement intégrante du corps même de l'édifice, *non pars " ædium*, mais qui sont néanmoins placés là comme des dépen- " dances à perpétuelle demeure de l'édifice, *propter ædes, perpetui " usus causa*."

Then as to immoveables by destination, Aubry & Rau define them as "les objets mobiliers que la loi répute immeubles à " raison de l'usage auquel ils ont été affectés par le propriétaire " d'un fonds de terre ou d'un bâtiment, dont ils ne font cependant " pas partie intégrante." Prudhon (vol. 1, No. 102) as "les choses qui, quoique mobilières en elles-mêmes, prennent civile- ment la qualité d'immeubles, en tant, qu'elles sont considérées, dans le droit, comme accessoires des fonds de terre ou des bâtimens auxquels elles ont été attachées, ou au service desquels elles se trouvent affectées par le propriétaire."

Mr. Demolombe (vol. 9, No. 200) says:—"Les immeubles, en " effet, tout seuls, et si j'osais dire *tout nus*, ne pourraient évidem- " ment pas nous rendre les services que nous leur demandons, " dans la société où nous vivons, dans l'état de nos mœurs et de

“ nos habitudes agricoles, commerciales et industrielles. Il faut donc les garnir, les revêtir de certains objets mobiliers qui sont indispensables pour que leur destination s'accomplisse; pour que ce sol produise des récoltes, pour que cette usine fonctionne, pour que cette maison soit habitable; et il est en conséquence très rationnel de considérer ces objets mobiliers comme des accessoires de l'immeuble, puisque, en effet, l'immeuble, sans eux, se trouverait tout à fait incomplet et insuffisant, et qu'il ne pouvait pas remplir la fonction qui lui est assignée dans l'ordre de nos besoins.” And in No. 258 he says:

“ Ce qui concerne cette immobilisation industrielle peut se résumer en deux propositions: 1. Il faut qu'il existe un bien immeuble par sa nature, qui soit le siège ou plutôt le principal moyen et l'instrument essentiel de l'industrie; 2. Lorsque cette première condition se rencontre, il faut, pour que des meubles y deviennent immeubles par destination, que ces meubles soient les agents directs et nécessaires de l'exploitation de l'immeuble lui-même.” In another place at No. 260 he calls the immovables by destination the muscles and arms of the *fonds* itself.

With regard to immovables by nature it has been decided in France that buildings erected on land forming part of the public domain under permission of the Government, are immovable, even though this permission is revocable, and can be hypothecated and seized as such, subject to the *condition résolutoire* in the event of the permission being revoked. (Gilbert, art. 518, No. 15.) Also that a railway established by the owner of a quarry for the working thereof, part on his own land and part on land leased by him for that purpose, is immovable by nature even as to the latter part, and is all comprised, as a whole, in the seizure of the quarry, (*idem*, No. 19), and that a boat exclusively intended for the use (*au passage*) of the inmates of a house situated on the bank of a river is immovable by destination (9 Dem. No. 318), and also “ que les rondelles ou tonnes destinées à transporter les bières chez les consommateurs étaient dans l'arrondissement de Lille, des ustensiles nécessaires au service et à l'exploitation des brasseries et comme tels au nombre des objets mobiliers que l'art. 524 C. Civ. déclare immeubles par destination,” (Cassation, Sirey 1817—1—359). To distinguish what is immovable by nature from what is immovable by destination is sometimes a task of difficulty. As an example of this I may refer to art. 523 of the Code Napoleon. It is as follows: “ Les tuyaux servant à la conduite des eaux dans une maison ou autre héritage, sont

"immeubles et font partie du fonds auquel ils sont attachés." The authors are divided as to whether these pipes should be regarded as immovable by nature or by destination (5, Dem. No. 149). Our codifiers did not frame a special article corresponding with art. 523 C.N. I should conclude that they must have considered that these pipes would fall under the general principles laid down in the articles they have given us respecting immoveables, and that a special article was therefore unnecessary. Mr. Laurent (vol. 5, No. 409) is one of the authors who profess the opinion that these pipes are immovable by nature, and for the reason that they are an accessory of the building just as much as the doors and windows. He gives us the explanation respecting this article, made by the speaker for the government at its introduction, as follows: "Il est des objets immeubles par leur nature, comme les fonds de terre, les bâtimens. On ne peut pas se méprendre sur leur qualité, elle est sensible. On ne peut pas d'avantage méconnaître la qualité d'immeubles dans les usines qui font partie d'un bâtiment, dans les tuyaux qui y conduisent des eaux et dans d'autres objets de la même espèce qui s'indentifient avec l'immeuble et ne font qu'un seul tout avec lui."

Mr. Brown referred me to the commentary of Mr. Prudhon (vol. 1, No. 141), when commenting on art. 523, C. N., above cited, and especially on the words "auquel ils sont attachés," he says:—"C'est à dire dans lequel ou pour le service duquel ils conduisent les eaux; et ci cette conduite a lieu à travers un héritage étranger, ceux des tuyaux qui reposent sur cet héritage font également partie de l'immeuble dans lequel les eaux sont dirigées, parce que la servitude avec ses accessoires appartient au fonds pour l'usage duquel elle est constituée."

The principle here laid down is that pipes which conduct water into a house, over the land of another, by right of a servitude, are immovable even where they cross such land, and form part of the immovable to which they carry the water.

Mr. White suggested that this citation from Prudhon did not apply, because it did not refer to a commercial corporation laying pipes in the public streets under permission granted by a special act of the Legislature. I am unable to agree with that view. By their act of incorporation the appellants were granted the right to supply water and gas to the inhabitants of the city of Sherbrooke and neighboring municipalities, and were authorized to open the streets and use them to lay therein their mains and pipes to conduct the water and gas to the consumers within the

limits mentioned in the act, and to pass over the property of some proprietors in order to lay their pipes to the property of others, and to break up and uplift all passages common to neighbouring proprietors or tenants and to dig trenches therein for the purpose of laying down pipes, with power to lift and repair them, and in fact a servitude has been created in their favor over all property belonging to the city and others required by them to lay mains and pipes and to keep them in repair. No person can interfere with this right. It is, of course, indisputable that these pipes are absolutely necessary to enable the appellants to carry out the object of their incorporation. From my examination of the articles of the code and of the commentators, I am led to the conclusion that the mains and pipes in question are immovables, and apart from the opinion of the authors, common sense seems to tell us that these mains and pipes are but the limbs of the body and a part of it. I do not know that it is necessary that I should decide whether they are immovables by nature as being an integral part of the *fonds*, or immovables by destination as being accessory to the *fonds*, incorporated with it, and essentially necessary to the operation of the works (*fonds*) to which they are attached and *affectées* by the proprietors. I have not overlooked Mr. White's argument, drawn from the wording of Art. 379 C. C., that these mains and pipes cannot be immovable by destination because they are not placed by the appellants on their own land. It is true that the appellants are not proprietors of the streets, but they have real rights therein; they have been given the *domaine utile* thereof, and are practically proprietors for all the purposes of carrying out the objects of their incorporation. The view I take that these mains and pipes are immovables is sustained by judgments both in this province and in France. I have found an *arrêt* of the Court of Appeal in France reported in Dalloz' Jurisprudence Générale, 1887, part 2, p. 81. Certain gas works (*usine à gaz*) were seized by a creditor, who asked to have them sold with all their dependencies as well as the immovables by destination forming part of the "*usine*." This demand was contested by the *syndic* of the estate. The holding was that the pipes laid under the public streets to conduct the gas to the consumers, formed part of the immovables as much as the *usine* itself and the gasometer; that detached from the works they would have no value; that the pipes with the gas retorts and gasometer formed one apparatus, which could be worked only

upon condition that there was no separation. This arrêt has so important a bearing upon the point at issue here that I will read it in full:

"En ce qui concerne l'usine à gaz:—Attendu que Roquencourt, qui a saisi l'usine à gaz, a demandé, en première instance que cette usine fut vendue avec toutes ses dépendances ainsi que les immeubles par destination en faisant partie; que cette demande a été contestée par le syndic Depret; que le tribunal a statué sur la contestation; qu'il ne s'agit donc pas, comme le prétend Depret, d'une demande nouvelle portée pour la première fois devant la cour.

"Attendu que les conduites destinées à amener le gaz en dehors de l'usine sous les voies publiques et privées des communes de Cobourg, Dives, et Beauzevol-Houlgate, constituent des immeubles comme l'usine à gaz elle-même et le gazomètre qui en dépend; que détachées de l'usine elles n'auraient aucune valeur; Que ces conduites forment avec les cornues, et le gazomètre un seul appareil, qui ne peut fonctionner, qu' à la condition de n'avoir aucune solution de continuité; qu'il y a lieu d'appliquer à ces conduites, par analogie, l'art. 523 C. Civ., d'après lequel les tuyaux servant à la conduite des eaux sont immeubles;

"Attendu que la prétention du syndic de considérer ces conduites comme ne faisant pas partie de l'usine à gaz, sa demande d'imposer à l'adjudicataire l'obligation d'exécuter les marchés pour la fourniture du gaz public et privé dans les communes de Cobourg, Dives, Benzéval, etc."

The other case to which I would refer is a judgment of Mr. Justice Gill, rendered on the 17th day of February last, in the Circuit Court at Lachute, in the case of *Lachute Town corporation v. Stuart et al.* The defendants were proprietors of a certain aqueduct consisting of pipes laid under ground from a lake called Sir John's lake, to the town and through the streets, public places and private property when necessary, for the purpose of supplying water to the residents, etc. The works were constructed under the authority of chap. 65, C.S.C., by persons acting as though they constituted a joint stock company under that act, but really being only a partnership. They were sued as a partnership for \$101, being \$5 business tax and \$96 special and general taxes, imposed on the aqueduct as being an immovable. The defendants contended that the aqueduct was not an immovable and was not taxable. The learned judge referred especially to the powers given to a company under chap. 65

C.S.C., to lay pipes in the streets, etc., and held that an aqueduct laid as that was, was an immovable by its nature and that the pipes were taxable.

This view seems to accord with the law in the United States. Cooley on Taxation, p. 368.

The mains of a gas light company are appurtenant to its lots, and only taxable therewith unless otherwise provided by statute. The word "machinery" has been held to include gas pipes laid under the streets, and gas meters. See note 6, p. 368, and cases there cited. Dillon, sec. 789, p. 967, (4th edition) says: "So the property of gas companies and of water companies within the municipality is, ordinarily, taxable by it." See also note 2 where cases are stated as holding that pipes laid in the streets of a city by a gas company, under a grant in their charter, are fixtures, and taxable as real estate; and that a lessee and proprietor of city water works for a term of years, whose contract of lease did not stipulate for exemption from city taxation, was held taxable in respect of such works, they being treated as real estate. I am therefore, of opinion that the respondents had a right to tax these mains and pipes as part of the real estate belonging to appellants in the city of Sherbrooke, and that the petition must be, as it is, dismissed with costs.

The judgment is as follows:—

"Considering that appellants are incorporated for the purpose (amongst other things) of furnishing gas and water to the city of Sherbrooke and certain neighboring municipalities, with power to lay down mains and pipes in the streets, squares and highways, and lanes thereof, to conduct the gas and water to the consumers thereof;

"Considering that appellants have constructed their gas works upon said part of lot one thousand two hundred and thirty nine and their water works upon said part of lot five hundred and seventy one, and have respectively connected therewith and attached thereto the mains and pipes which they are so authorized to lay by their act of incorporation for the purpose of supplying gas and water to the consumers thereof;

"Considering that respondents are duly authorized to levy taxes upon all lots and parts of lots of land in said City with all buildings and erections thereon, and for the purpose of said taxation they have placed a value of thirty-six thousand dollars on the land, buildings and appurtenances constituting said gas works, and of seventy eight thousand dollars on the land, construc-

tions and appurtenances constituting said water works, and that they have included in said respective valuations the value of said mains and pipes respectively attached to said gas works and water works ;

" Considering that appellants by their present appeal claim that the said mains and pipes are not taxable property, not being immovables, and moreover said tax was arbitrarily and unjustly laid ;

" Considering that said gas mains and pipes are attached to and form part of the gas works (*usine à gaz*), and that said water mains and pipes are attached to and form part of the said water works, and that without said mains and pipes the said gas and water works would be of no value, and appellants could not supply gas and water to persons requiring the same ;

" Considering that said gas mains and pipes with the other work constructed on said part of lot one thousand two hundred and thirty nine form but one apparatus (*appareil*) which can only be worked upon condition that there is no disconnection, and that in like manner the water mains and pipes with the works constructed on said part of lot five hundred and seventy one form but one apparatus which can only be worked upon like condition ;

" Considering that said mains and pipes for the reasons aforesaid are immovables and are subject to taxation ;

" Considering that appellants have failed to prove the material allegations of their petition ;

" Doth dismiss the appeal and petition of appellants with costs."

Wm. White, Q. C., for appellant.

H. B. Brown, Q. C., for respondent.

COURT OF QUEEN'S BENCH—IN APPEAL.*

Criminal law—53 Vict. (D.) ch. 37, s. 11—*Conjugal union*—*Cohabitation*.

HELD:—The mere fact of cohabitation between two persons, each of whom is married to another person, will not sustain a conviction under R. S. C., ch. 161, as amended by 53 Vict. (D.), ch. 37, s. 11.—*Regina v. Labrie, Dorion, C.J., Cross, Baby, Bossé, Doherty, JJ.*, March 18, 1891.

* To appear in Montreal Law Reports, 7 Q.B.

Negligence—Child killed on street railway.

HELD:—Reversing the judgment of LORANGER, J., M. L. R., 7 S. C. 10, where a child, two years of age, through the negligence or want of vigilance of its parents, is allowed to leave its residence and get on the track of a street railway, and is killed there by a car of the railway company, without any fault on the part of the employees of the company, an action of damages by the father of the child will not be maintained.—*Cie. de Chemin de Fer à Passagers de Montréal & Dufresne*, Baby, Bossé, Doherty, Cimon, JJ., (Doherty, J. diss.) June 25, 1891.

Procedure—Husband and wife—Wife erroneously described as separated as to property—Exception to the form—Amendment—Husband summoned only to authorize his wife—Cannot be made a party personally on motion to amend.

HELD:—1. The fact that the wife has assumed the quality of separated as to property, in a deed of lease to her, does not debar her, in an action against her in that quality, from pleading by exception to the form, and proving, that she is common as to property with her husband.

2. The plaintiff, under such circumstances, will be allowed to amend the writ and declaration by describing the wife as common as to property.

3. Where the husband has been summoned merely for the purpose of authorizing his wife (defendant), the plaintiff will not be allowed, on a motion to amend the original writ and declaration, to make the husband a party to the action personally, without summoning him in his personal capacity.—*O'Connor & Inglis*, Lacoste, Ch. J., Bossé, Blanchet, Wurtele, Tait, JJ., Nov. 27, 1891.

Writ of error—Plaintiff in contempt.

HELD:—That where the plaintiff in error, who had been convicted of a misdemeanour, was liberated on bail to appear at the ensuing term of the Court of Queen's Bench sitting in appeal and error, and on his default to appear his bail was declared forfeited, he is not entitled to be heard by counsel on the merits of the case, in his absence.—*Woods v. Reginam*, Lacoste, Ch. J., Bossé, Blanchet, Wurtele, Tait, JJ., Nov. 21, 1891.

THE LEGAL NEWS.

VOL. XV.

FEBRUARY 1, 1892.

No. 3.

CURRENT TOPICS AND CASES.

Sir Francis G. Johnson, Chief Justice of the Superior Court, in the beginning of January became seriously indisposed from the effects of a bronchial attack. Information that the learned Chief Justice was out of danger and was progressing favourably, was welcomed with much pleasure. It will be some time, however, before the learned judge will be strong enough to resume work. Mr. Justice Jetté, of the Superior Court, who was also very ill for several weeks, has sufficiently recovered to attend to official business.

It was anticipated that the new year would bring the announcement that the honour of knighthood had been conferred upon the new Chief Justice of the Court of Queen's Bench. It may be surmised that the honour will not be long deferred, the precedent having been established for several years past in respect of the chief justiceship of the two leading Quebec Courts, and the present occupant of the position in the Queen's Bench being in every way entitled to the honour.

In *Bell v. Dominion Telegraph Co.*, 3 Leg. News, 405, Johnson, J., in the Superior Court, held that a telegraph company is responsible to the person to whom a message

is directed, for negligence in failing to deliver a telegram. It was further held that the rights of the person to whom the message was directed could not be affected by a condition printed on the blank form, requiring the message to be repeated. Jetté, J., held to the like effect in *Watson v. Montreal Telegraph Co.*, 5 Leg. News, 87. Art. 1676 of the Civil Code expressly declares that carriers are liable, notwithstanding notice of condition limiting liability, whenever negligence is proved against them. There seems to be no reason for discriminating between carriers and telegraph companies in this particular, and in the recent case of *Great North Western Telegraph Company and Laurance*, decided by the Court of Appeal, Montreal, January 18, 1892, the Court, without considering it necessary to determine whether telegraph companies are carriers, held on the broad ground of public policy and good morals, that a telegraph company cannot contract that it shall not be responsible for its own negligence, and that any condition having that effect may be disregarded, even if brought to the notice of the other party to the contract.

In *Magor & Kehlor*, Queen's Bench, Montreal, Jan. 18, 1892, the question, between vendor and purchaser, was whether the former had complied with the conditions of the contract as to the shipment and delivery of goods sold. The vendor was doing business in St. Louis, Mo., and on the 22nd March he concluded a sale of one thousand barrels of flour to a purchaser in Montreal, "shipment 15th," meaning 15th April. The vendor shipped the flour March 30th—sixteen days in advance. The purchaser objected that the shipment was premature. The vendor acknowledged the mistake, but held the flour in Montreal, and tendered it again on April 18, that is about the date it would have arrived here had it been shipped from St. Louis on the 15th April. The purchaser still declining to take it, the vendor caused it to be sold in Montreal, and brought action for the difference between the amount realized and the contract price. Mr. Justice

Davidson, in the Superior Court, maintained the action, and this decision was affirmed in appeal, the Court being of opinion that the proper construction of the contract was not that the flour must be shipped on the 15th April, and on no other day, but that the date of shipment was mentioned to fix approximately the time of delivery. The case on which the purchaser chiefly relied was *Bowes v. Shand*, 2 App. Ca. 455. Bowes purchased rice from Shand, "to be shipped at Madras during the months of March and April, 1874." The rice filled 8,200 bags, of which all but 50 bags were actually put on board on dates between 23rd and 28th February. The case went through all the Courts to the House of Lords, where the judgment of the Court of Appeal was reversed, and it was held that the buyer might refuse to accept. In *Magor & Kehler* the Court seem to have been of opinion that no grievance had been shown. The market was not affected by the premature shipment, the quality of the flour had not deteriorated, and it was tendered to the buyer in Montreal at the proper date under the contract. The words "shipment 15" were not part of the description of the goods.

In *Trester & C. P. R. Co.*, Queen's Bench, Montreal, January 18, 1892, the action was against a carrier for delay in the delivery of goods. The delay was caused by an error in the way-bill, received by the defendants with the goods, which stated that the destination was Hamilton, whereas it should have been Montreal. The Court held, confirming the judgment of the Court of Review, that a carrier who receives goods *en route* from another carrier, is not responsible for delay in the delivery of the goods, where such delay is caused by an error in the way-bill of a previous carrier, delivered to the succeeding carrier with the goods, which way-bill stated a place of destination which was erroneous.

COURT OF QUEENS BENCH—MONTREAL.

Accident insurance—Risk incidental to employment—Breach of contract.

M., who was described in the application for insurance as "Superintendent of the International Railway," was insured by the company appellant, against accidents. By one of the conditions of the policy it was stipulated as follows:—"The insured must at all times observe due diligence for personal safety and protection, and in no case will this insurance be held to cover either death or injuries occurring from voluntary exposure to unnecessary or obvious danger of any kind, nor death or disablement...from getting or attempting to get on or off any railway train, etc., while the same is in motion." M., when travelling on the business of his railway, was killed while getting on a train in motion.

HELD:—That inasmuch as M. was insured as superintendent of a railway, and there was evidence that his duties required him to get on and off trains in motion, of which fact the insurers had knowledge, the condition did not apply, and the company was liable.—*Accident Insurance Co. of N. A. & McFee*, Dorion, Ch. J., Baby, Bossé, Doherty, Cimon, JJ., June 25, 1891.

Water-course—Floatable river—Seigniorial rights—C. S. L. C., ch. 51—Expertise—Direct action—Conclusions.

HELD:—1. Since the abolition of seigniorial rights a servitude alleged to have been acquired from the seignior previously, for the construction of dams, without payment of indemnity, has no effect.

2. Ch. 51, C. S. L. C., applies to floatable as well as non-floatable rivers.

3. The remedy given by ch. 51, C. S. L. C., to a person who is damaged by the construction of a dam on a water-course, is not exclusive, and does not deprive him of the ordinary remedy by action before a competent Court.

4. Where in such action the plaintiff prays for the demolition of the dam, and for damages, a judgment which orders the payment of damages as awarded, and, in default of payment within the delay fixed, orders the demolition of the dam, is not *ultra petita*.—*Bazinet & Gadoury*, Lacoste, C.J., Baby, Bossé, Wurtele, JJ., Nov. 26, 1891.

Constitutional law—Executive power—Commission of inquiry—R. S. Q. 596, 598—Prohibition, Writ of.

Held:—Reversing the judgment of WURTELE, J., M. L. R., 6 S. C. 289, 1. An inquiry into an alleged attempt to influence and corrupt members of the provincial legislature is a matter connected with the good government of the province, and the conduct of the public business therein, within the meaning of R. S. Q. 596.

2. A commission of inquiry issued by the Lieutenant-Governor-in-Council under the said section, has the same power to enforce the attendance of witnesses, and to compel them to give evidence before it, as is vested in any Court of law in civil cases, and has therefore the power to punish by fine or imprisonment, or both, any contempt of its authority by any person summoned as a witness refusing to appear, or to answer questions put to him concerning the matters which are the subject of such inquiry.

3. Under the provisions of the B. N. A. Act, 1867, the provincial legislature was empowered to enact the provisions contained in Articles 596 and 598 of the Revised Statutes of Quebec.

4. Even if the commissioners, in the course of the inquiry which they were duly authorized to make, had permitted some irregular or illegal questions to be put to a witness, their improper ruling on the subject could not have authorized the issue of a writ of prohibition, which only applies to cases of want of jurisdiction, and not to cases of erroneous judgments, for which other remedies are provided.—*Turcotte es qual. & Whelan*, Dorion, C.J., Cross, Baby, Bossé, Doherty, JJ., (Baby & Doherty, JJ., diss.) March 26, 1891.

Constitutional law—Sale of intoxicating liquors—Municipal corporation—Art. 561, M. C.—R. S. Q. 6118.

Held:—That article 561 of the Municipal Code, as amended by 51-52 Vict. ch. 29, s. 6 (R. S. Q. 6118), by which a municipality is authorized to prohibit the sale of intoxicating liquors in quantities less than two gallons, within the limits of the municipality, is within the powers of the provincial legislature.—*Corporation of Village of Huntingdon & Moir*, Dorion, C. J., Baby, Bossé, Doherty, Cimon, JJ., March 21, 1891.

Sale of goods—Slight variation from conditions of contract—Sight drafts.

M. sold McB. ten car loads of peas, price payable by drafts at sight, with bills of lading attached. M., with the first car load, made a draft on demand instead of a sight draft, asking at the same time to be informed whether McB. wanted the rest at sight. McB. refused to accept the draft, or to take delivery of the peas, and repudiated the contract.

Held:—That the slight difference in the drafts did not constitute a sufficient reason for McB. to repudiate the contract, as he might have accepted the demand drafts on condition that they would be payable only three days after acceptance; and moreover it appeared that he had repudiated the contract on a different ground before the drafts were presented.—*McBean & Marshall, Baby, Bossé, Doherty, Cimon, JJ.*, June 25, 1891.

Criminal law—Refusal to provide for wife.

Held:—That on an indictment of a husband for refusal to provide for his wife, the jury should not consider evidence as to the manner of living between husband and wife previous to the time laid in the indictment, or promises made by the husband after his arrest.—*Regina v. Arent, Wurtele, J.*, Dec. 1891.

*SUPERIOR COURT, MONTREAL. **

Action by father for personal injuries to minor child—Medical examination of child.

HELD:—That in an action by a father for personal injuries suffered by his minor child, the defendant, before pleading, may obtain an order for an examination of the child's body by a physician.—*McCombe v. Phillips, de Lorimier, J.*, Oct. 7, 1891.

Carrier—Goods refused by consignee—Sale by carrier.

HELD:—Where the consignee refuses to accept goods from the carrier at the place of delivery, the carrier is not justified in selling the same by private sale, without notice to the consignor or consignee; and a pretended authorization to sell, by the consignee who has refused to accept the goods, is without effect. The consignor in such case is entitled to recover the value of the goods, less freight and storage.—*Cottingham v. Grand Trunk R. Co., Tait, J.*, Oct. 30, 1891.

* To appear in Montreal Law Reports, 7 S. C.

SUPREME COURT OF CANADA.

OTTAWA, NOV. 6, 1891.

Quebec]

DAWSON V. DUMONT.

Appeal—Jurisdiction—Action in disavowal—Prescription—Appearance by attorney—Service of summons—C. S. L. C. ch. 83, sec. 44.

In an action brought in 1866 for the sum of \$800 and interest at 12½ per cent. against two brothers, J. S. D. and W. McD. D., being the amount of a promissory note signed by them, one copy of the summons was served at the domicile of J. S. D. at Three Rivers, the other defendant W. McD. D. then residing in the state of New York. On the return of the writ the respondent filed an appearance as attorney for both defendants, and proceedings were suspended until 1874 when judgment was taken, and in December, 1880, upon the issue of an *alias* writ of execution, W. McD. D. having failed in an opposition to judgment, filed a petition in disavowal of the respondent. The disavowed attorney pleaded *inter alia* that he had been authorized to appear by a letter signed by J. S. D., saying "be so good as to file an appearance in the case to which the enclosed has reference &c."

The petition in disavowal was dismissed. On the appeal to the Supreme Court of Canada, the respondent moved to quash the appeal on the ground that the matter in controversy did not amount to the sum of \$2,000.

Held, 1st., that as the judgment obtained against W. McD. D. in March, 1874, on the appearance filed by the respondent, exceeded the amount of \$2,000, the judgment on the petition for disavowal was appealable.

2nd. That there was no evidence of authority given to the respondent or of ratification by W. McD. D. of respondent's act, and therefore the petition in disavowal should be maintained.

3rd. Following *McDonald v. Dawson*, Cassels' Digest, p. 322, and 11 Q. L. R. 181, that the only prescription available against a petition in disavowal is that of thirty years.

4th. That where a petition in disavowal has been served on all parties to the suit, and is only contested by the attorney whose authority to act is denied, the latter cannot on appeal complain that all parties interested in the result are not parties to the appeal.

Appeal allowed with costs.

Irvine, Q.C., & Robertson for appellant.

McLean for respondent.

OTTAWA, Nov. 10, 1891.

Quebec.]

HURTUBISE v. DESMARTEAU.

Supreme & Exchequer Courts Amending Act, 1891, sec. 3 — Appeal from Court of Review.

By sec. 3 of the Supreme and Exchequer Courts Amending Act of 1891, an appeal may lie to the Supreme Court of Canada from the Superior Court in Review, Province of Quebec, in cases which by the law of the Province of Quebec are appealable direct to the Judicial Committee of the Privy Council.

In a suit between H. *et al* and D., a judgment was delivered by the Superior Court in Review at Montreal in favour of D. the respondent on the same day on which the Amending Act came into force. On appeal to the Supreme Court of Canada taken by H.,

Held, that H. *et al* (the appellants) not having shown that the judgment was delivered subsequent to the passing of the Amending Act, the court had no jurisdiction.

Quære—Whether an appeal will lie from a judgment pronounced after the passing of the Amending Act in an action pending before the change of the law.

Appeal quashed with costs.

Geoffrion, Q.C., for motion.

Charbonneau & Brosseau contra.

OTTAWA, Nov. 10, 1891.

Quebec]

BROSSARD et al. v. DUPRAS et al.

Composition—Loan to effect payment—Secret agreement—Failure to pay—Art. 1039 and 1040 C. C.

On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at 4, 5 and 12 months. At the time L. was indebted to the Exchange Bank (in liquidation), who did not sign the composition deed, in a sum of \$14,000. B. *et al*, the appellants, were at that time accommodation endorsers for \$7,415 of that amount, but held as security a mortgage dated 5th September, 1881, on L's real estate. The Bank having agreed to accept \$8,000 cash for its claim, B. *et al.*, on the 11th January, 1884, advanced \$3,000 to L. and took his promissory notes and a new mortgage for the amount, having discharged and released on the same day the previous mortgage

of the 5th September, 1881. This new transaction was not made known to D. *et al.*, who on the 14th January, 1884, advanced a sum of \$3,000 to L. to enable him to pay off the Exchange Bank, and for which they accepted L's promissory notes. L. the debtor, having failed to pay the second instalment of his notes, D. *et al.*, who were not originally parties to the deed, brought an action to have the transaction between L. and the appellants set aside, and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors.

Held, reversing the judgments of the courts below, that the agreement by the debtor L., with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition. The Chief Justice and Taschereau, J., dissenting.

Per Fournier, J. That the mortgages ought to be set aside, having been registered on the 13th January, the respondent's right of action was prescribed by one year from that date. Art. 1040 C. C.

Appeal allowed with costs.

Geoffrion, Q. C., and Beausoleil for appellants.

Ouimet, Q. C., for respondents.

OTTAWA, Nov. 16, 1891.

Quebec.]

HUS V. COMMISSAIRES D'ÉCOLES DE STE. VICTOIRE.

Mandamus—Establishment of new school district—School Visitors—Superintendent of Education—Jurisdiction of upon appeal—Approval of three visitors—40 Vic. ch. 22, sec. 11, P. Q., R. S. Q. Art. 2055.

Upon an application by H., appellant, for a writ of mandamus to compel the respondents to establish a new school district in the Parish of Ste. Victoire in accordance with the terms of a sentence rendered on appeal by the Superintendent of Education under 40 Vic. ch. 22, sec. 11, P. Q., the respondents pleaded *inter alia* that the superintendent had no jurisdiction to make the order, the petition in appeal to him not having been approved of by three qualified visitors. The decree of the Superintendent alleged that the petition was also approved of by one L., Inspector of Schools.

Held, affirming the judgment of the Court of Queen's Bench

ior Lower Canada (Appeal side), that the petition in appeal must have the approval of three visitors qualified for the municipality where the appeal to the superintendent originated, and as Rev. A. Desorcy, one of the three visitors who had signed the petition in appeal, was parish priest of an adjoining parish, and not a qualified school visitor for the municipality of Ste. Victoire, the sentence rendered by the Superintendent was null and void.

Taschereau, J., dissented on the ground that as the decree of the superintendent stated that L. the Inspector of Schools was a visitor, it was *prima facie* evidence that the formalities required to give the superintendent jurisdiction had been complied with. C. S. L. C. ch. 15, sec. 25.

Appeal dismissed with costs.

Lacoste, Q.C., & Germain for appellant.

Geoffrion, Q.C., for respondents.

OTTAWA, NOV. 16, 1891.

Quebec.]

QUEBEC & C. RY. CO. V. MATHIEU.

Expropriation—Q. R. S. 5164 ss. 12, 16, 17, 18, 24—Award—Arbitrators—Jurisdiction of—Lands injuriously affected—43-44 Vic. ch. 43, P. Q.—Appeal—Amount in controversy—Costs.

In a railway expropriation case the respondent in naming his arbitrator declared that he "only appointed him to watch over the arbitrator of the company," but the company recognized him officially, and subsequently an award of \$1,974.25 and costs, for land expropriated and damages, was made under art. 5164 R. S. Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award:

Held, affirming the judgment of the Courts below, that the appointment of the respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction.

Strong and Taschereau, JJ., *dubitantibus* whether the case was appealable, the amount in controversy, deducting the taxed costs, being under \$2,000.

Appeal dismissed with costs.

Irvine, Q.C., & Bedard for appellants.

Casgrain, Q.C., for respondent.

OTTAWA, Nov. 16, 1891.

Quebec.]

HOLLAND V. ROSS.

Crown Lands, P. Q.—Location tickets—Transfer of purchaser's rights—Registration of—Waiver by Crown—Cancellation of license—23 Vic. c. 2, secs. 18 & 20—32 Vic. c. 11 sec. 18 (Q)—36 Vic. c. 8 Q.

A location ticket of certain lots was granted to G. C. H. in 1863. In 1872, G. C. H. put on record with the Crown Land Department that by arrangement with the Crown Land Agent he had performed settlement duties on another lot known as the homestead lot. In 1874, G. C. H. transferred his rights to appellant, paid all monies due with interest on the lots, registered the transfer under 32 Vict. c. 11, sec. 18, and the Crown accepted the fees for registering the transfer and for the issuing of the patent. In 1878, the Commissioner cancelled the location ticket for default to perform settlement duties.

Held, That the registration by the Commissioner, in 1874, of the transfer to respondent was a waiver of the right of the Crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected.

Appeal allowed with costs.

Lacoste, Q.C., & Nicolls for appellant.

Laflamme, Q.C., & Robertson, Q.C., for respondent.

THE DEATH OF PRINCE VICTOR.

At the opening of the January Term of the Court of Appeal at Montreal, January 15th, the Hon. Chief Justice Lacoste referred to the decease of the Duke of Clarence and Avondale in the following terms :—

Il est de notre devoir, avant de commencer l'ouvrage de ce terme, d'exprimer notre douleur profonde de la mort du prince Albert Victor, héritier présomptif de la Couronne d'Angleterre.

Nous nous associons de tout cœur au grand deuil dans lequel sont plongés, notre gracieuse Souveraine, le prince et la princesse de Galles, la famille royale ainsi que la fiancée du noble défunt, et nous leur offrons en toute humilité nos sympathies et nos condoléances.

Placé par sa naissance dans une position tout à fait exceptionnelle, après avoir enduré les peines et les labeurs que nécessitent l'apprentissage d'une vie comme la sienne, le prince a été enlevé

à l'âge où l'homme commence à illustrer sa vie et au moment où une union prochaine, depuis longtemps désirée, devait lui assurer pour toujours le bonheur de la vie de famille.

Il a dû renoncer avec peine à la gloire de régner sur un des plus puissants peuples du monde.

Il a dû lui en coûter de faire le sacrifice de celle qu'il avait choisi pour être la compagne de sa vie.

Mais la mort n'épargne pas le bonheur et elle choisit ses victimes sur les marches du trône comme dans la chaumière du pauvre, faisant partout des blessures cuisantes.

Sous ses coups la douleur est toujours la même, le diadème n'empêche pas les yeux de pleurer, ni le manteau royal—le cœur de saigner.

Nous comptons que la Providence ne refusera pas à ces illustres affligés le baume de la consolation qu'elle verse dans les plaies du dernier de ses serviteurs.

Par respect pour la mémoire du noble défunt, la cour ne siégera pas le jour des funérailles.

INSOLVENT NOTICES ETC.

Quebec Official Gazette, Dec. 26 & Jan. 2.

Liquidation under Winding up Act.

HERALD COMPANY, Montreal.—Claims to be filed with W. H. Whyte, liquidator, on or before 30th January.

Dividends.

BEAUDOIN, NAPOLEON.—First and final dividend, payable Jan. 11, J. E. E. Marion, St. Jacques de l'Achigan, curator.

CADIEUX, J. Bte. Eldège.—First and final dividend, payable Jan. 4, D. Chaput, St. Valerien de Milton, curator.

CHARTIER, GILBERT, St. Benoit.—First dividend, payable Jan. 25, Kent & Turcotte, Montreal, joint curator.

CYR & FRERE, J. A.—First and final dividend, payable Jan. 14, C. Desmarteau, Montreal, curator.

DAOUST, A. S., grocer, Montreal.—First and final dividend, payable Jan. 14, C. Desmarteau, Montreal, curator.

DROUIN & FRERE, L., Quebec.—First and final dividend, payable Jan. 11, D. Arcand, Quebec, curator.

FLEURY, fils, PIERRE, township of Hatley.—First and final dividend on proceeds of immovables, payable Jan. 22, Millier & Griffith, Sherbrooke, joint curator.

- FRAPPIER & Co., Montreal.—First dividend, payable Jan. 25, Kent & Turcotte, Montreal, joint curator.
- LAMALICE & Co., A. E., Montreal.—First dividend, payable Jan. 25, Kent & Turcotte, Montreal, joint curator.
- MONAST, JOSEPH T.—First and final dividend, payable Jan. 7, J. M. Marcotte, Montreal, curator.
- PICARD & CHEVALIER, Joliette.—First dividend, payable Jan. 25, Kent & Turcotte, Montreal, joint curator.

Separation as to Property.

- BEAUREGARD, Mathilde, v. Alphonse Brodeur, farmer, parish of Ste. Marie Madeleine, Dec. 14.
- EGAN, MARIA, v. John Andrew Peard, plumber, Montreal, Dec. 22.
- FORTIER, OTHILIE *alias* ODILLIER, v. Joseph *alias* Zozime Touchette, trader, St. Paul d'Abbotsford, Dec. 26.
- LANDRY, ALBINA, v. Camille Landry, laborer, parish of l'Epiphanie, Dec. 23.
- SEALE, MARY ANN, v. Richard Tyler, trader, Montreal, Dec. 18.

Quebec Official Gazette, Jan. 9.

Judicial Abandonments.

- BRISEBOIS, PIERRE, trader, Montreal, Dec. 28.
- GAGNON, JOHNNY, shoe dealer, Pointe au Pic, Dec. 26.
- GIGUÈRE, RICHARD, trader, Ste. Germaine, Dec. 30.
- HUNTER, SAMUEL, trader, Billerica, Dec. 31.
- LEFEBVRE, ODINA, grocer, Quebec, Jan. 4.
- MARCEAU, EVARISTE, wheelwright, Quebec, Dec. 30.
- PAQUET, CHARLES, Bienville, Jan. 4.
- TURGEON, DARVEAU & Co., boot & shoe dealers, Quebec, Jan. 4.

Curators Appointed.

- BEAUCHAMP & Co., MONTREAL.—Lamarche & Olivier, Montreal, joint curator, Jan. 7.
- BOYER & Co., J., St. John.—C. Desmarteau, Montreal, curator, Dec. 28.
- CAMPEAU, EVANGÉLISTE, hotel-keeper, Ste. Marthe.—C. Desmarteau, Montreal, curator, Jan. 4.
- DION, J. E., trader, Robertson Station.—H. A. Bedard, Quebec, curator, Dec. 31.
- FOREST, GEORGE, Bonaventure River—Bedard & Lobel, New Carlisle, joint curator, Jan. 4.

GAUVREAU & Co., T. A., cement manufacturers, Quebec.—N. Matte, Quebec, curator, Jan. 7.

GELINAS, DAME M. R. E. (Dubuc & Co), Drummondville.—Kent & Turcotte, Montreal, joint curator, Dec. 31.

GORDON, C. H. (Gordon & Howie), Staunstead Junction.—J. McD. Hains, Montreal, curator, Jan. 5.

JARRY, HENRI V., St. Germain de Grantham.—C. Desmarteau, Montreal, curator, Dec. 26.

JOHNSON, C. E., Warwick.—H. A. Bedard and A. Quesnel, Quebec, joint curator, Dec. 31.

RICKABY Co., J. B. H., Montreal.—J. McD. Hains, Montreal, curator, Jan. 2.

STANDARD STEAM LAUNDRY Co.—C. Desmarteau, Montreal, liquidator, Dec. 28.

TURGEON & CORRIVEAU, traders, Beaumont.—H. A. Bedard, Quebec, curator, Dec. 29.

PAQUIN, JOSEPH.—L. Bedard, Montreal, curator, Dec. 28.

Dividends.

DUPRESNE, ADOLPHE, carriage maker, St. Dominique.—First and final dividend, payable Jan. 19, J. O. Dion, St. Hyacinthe, curator.

MCGENTYRE, EDWARD, Montreal.—First dividend (40c), payable Jan. 26, J. McD. Hains, Montreal, curator.

McLACHLAN BROS & Co., Montreal.—First dividend, payable Jan. 26, W. A. Caldwell, Montreal, curator.

GENERAL NOTES.

THE JURISDICTION OF CAMBRIDGE UNIVERSITY.—It is singular that a great University like Cambridge should not have legal ability within its reach to exercise with precision as well as moderation the exceptional jurisdiction confided to it. This ancient university has jurisdiction over the town for the protection of undergraduates, the principal point of attack and defence being their morals. The Vice-Chancellor's Court is vested with power to punish prostitutes for certain offences; but it appears from recent occurrences that the charges are sometimes unskillfully framed. For instance, a prostitute, not long ago, was sent to a house of correction for a fortnight, "for walking with a member of the university." To a lawyer, of course, this way of putting the offence is ridiculous; and the moral is that if universities are to retain exceptional powers they must exercise them with due attention to precision of statement.

A CURIOUS TAX UPON EMPLOYERS.—Every domestic servant in Germany now keeps a little book, to which the mistress employing her must contribute every week a five cent stamp provided by the Government for this special purpose. In case of sickness, or when age incapacitates a servant, the Government redeems the stamps contained in the book, the contents of which are really a tax upon one class to assist in the maintenance of another less fortunate class. The scheme is said to be regarded with favour by the employer as well as by the employed.

SECRECY OF THE CONFESSIONAL.—The question whether a priest is bound to give evidence in Court based on information obtained under the seal of the confessional, which was answered lately in the affirmative by the judicial authorities in a Norman town, has just been negatived by the Cour de Cassation of Paris. A priest who would not betray secrets learned by him in 'his ecclesiastical capacity, was fined. He appealed, and the Cour de Cassation has reversed the judgment.

LADIES AND PEERAGES.—There have not been many instances in recent times, says the *Illustrated London News*, of a peerage passing from a mother to a son, for peeresses in their own rights are few. It is a curious fact that peerages in the feudal days were generally conferred to pass to lineal descendants, whether female or male; but in recent and more civilized times it has grown customary to confine the succession to heirs male. When a title is inherited through a female heir, it will almost always be found that the peerage is not of modern but, on the contrary, of very old, creation. If there is any object really gained in keeping up hereditary dignities, peerages should be given to descend in the female line; for there are few of the very old titles in the peerage which have not at some time passed in this manner, and those which do not so pass, rarely survive long. The average duration of a peerage confined to heirs male is only about one hundred years.

BANKRUPTCY RETURNS.—Failures in the Province of Quebec in 1891 numbered 680 against 491 in the previous year.

THE MONTREAL COURT HOUSE.—The alterations in this building are advancing rather slowly. From a recent statement it appears that the amount of the contract was \$194,999. Up to date there have been paid the following sums:—On account of contract \$100,000; for extras \$52,677. According to the architects' certificates there is now due, on the contract \$47,000; and

for extras \$47,857. This makes the cost of the work, at the present stage, \$247,534.

RIGHT OF TRADEMARK.—In *Montgomery v. Montgomery*, House of Lords, May 12, 1891, the respondents and their predecessors had carried on business more than a century as brewers at Stone, a small town in Staffordshire, and their ale had become well known to the trade and to the public, as "Stone Ale." There was no other brewery at Stone. The appellant built a brewery at Stone, and sold his ale as "M.'s Stone Ale." *Held*, that the respondents had acquired by user a right to the use of the words "Stone Ale," and that the conduct of the appellant being calculated to deceive the public, the respondents were entitled to an injunction to restrain him.

READY FOR WAR.—Mr. J. B. Castle, of Sandwich, Ill., was recently admitted to the Illinois Bar. Ex-Senator Castle, his father, editor of the *Sandwich Argus*, killed the fatted calf, called in the neighbours, and rejoiced thereat. The *Argus* says: "J. B. Castle (he is our son) was admitted to the bar by the Appellate Court, on Friday, of last week. Now we can get all the law we want at home; heretofore we had to go to our neighbours. Won't some body step on our coat tails?"

DIVORCE IN FRANCE AND THE UNITED STATES.—The *Economiste Français* publishes an interesting article comparing the recently compiled tables showing the number of divorces granted in France since the new law came into force, and in the United States and other countries during the same period. The French law of divorce came into force on August 1, 1834, and in the five months of that year 1,657 divorces were granted, the figures for the four following years being 4,227, 2,949, 3,636, and 4,708. The statistics which have been published in France do not come down later than 1888, and in that year, according to the writer in the *Economiste Français*, there were 23,472 divorces in the United States, this being nearly 4,000 more than were granted in France, England, Italy, Germany, Holland, Sweden, Norway, Austria, Roumania, and Canada put together. Comparing the divorces in France and the United States with those of other countries, the following figures are given: Germany, 6,161; Russia, 1,789; Austria, 1,718; Switzerland, 920; Denmark, 635; Italy, 556; Great Britain and Ireland, 508; Holland, 339; Belgium, 290; Sweden, 229; Australia, 100; Norway, 68; and Canada, 12.

THE LEGAL NEWS.

VOL. XV.

FEBRUARY 15, 1892.

No. 4.

CURRENT TOPICS AND CASES.

In *Bank of British North America & Stewart*, Court of Queen's Bench, Montreal, January 26, 1892, an important question of jurisdiction was decided. The cause of action arose at St. John, New Brunswick. The action against the Bank was purely personal, being for damages, and the question, raised by declinatory exception, was whether the Bank, being a foreign corporation, with head office at London, England, could be summoned at Montreal, and whether service on the manager at the office of the Bank in Montreal was equivalent to a personal service. Art. 27, C. C., says that "aliens, although not resident in Lower Canada, may be sued in its Courts for the fulfilment of obligations contracted by them even in foreign countries." The majority of the Court held that this article gives jurisdiction as to actions in Quebec against foreign corporations. Then, as to the summons at Montreal, Art. 34 of the Code of Procedure says, "in matters purely personal, the defendant may be summoned either (1) before the Court of his domicile; (2) before the Court of the place where the demand is served upon him personally." The majority of the Court held that the principal establishment in the province, of a foreign corporation doing business therein, is its domicile within the meaning of this article. And, secondly, that a service at

such principal establishment is equivalent to a personal service. It was held, therefore, that the Bank was properly summoned at Montreal by service of demand at the office there, although the head office of the Bank is in London, England. Justices Bossé and Blanchet dissented.

In *Merchants Bank of Canada & Cunningham*, Queen's Bench, Montreal, January 18, 1892, the question was whether the endorsers of a promissory note, whose names appeared below that of the payee on the back of the note, were warrantors. These endorsers, by mistake, had not received notice of protest for non-payment, and unless they were warrantors they were discharged. It appeared that the note being taken to the Bank for discount, the Bank required additional names, and the two endorsers, without having been holders of the note, and without having received any consideration, endorsed it for the accommodation of the maker, and to enable him to obtain funds at the Bank. They swore, however, that they did so, having confidence in the solvency of the maker and payee, and not with the intention of becoming warrantors. The Court held the evidence insufficient to destroy the presumption arising from the position of the names on the note, and the endorsers accordingly were freed from liability by the absence of notice of protest.

In *Parker & Langridge*, Queen's Bench, Montreal, January 26, 1892, the Court held that to justify a defence of reasonable and probable cause to an action for malicious prosecution, the circumstances must be such as would produce on the mind of a cautious and prudent man an honest conviction of the guilt of the party he accuses. Where an employer, on receipt of an anonymous letter, the statements of which were not corroborated in any way, caused his foreman to be arrested on a charge of theft, and opposed the liberation of the accused on bail, and it

was not established that any theft whatever had been committed, it was held that the employer had acted without reasonable and probable cause.

In *Sise v. Pullman Palace Car Co.*, Superior Court, Montreal, Tait, J., January 30, 1892, the question was whether a company providing sleeping accommodation for first class passengers carried by a railway company, is liable to the same extent as an inn-keeper or boarding-house keeper, who, under Art. 1814 of the Civil Code, is responsible as necessary depositary for the things brought by travellers who lodge in the house. The Court held that the deposit of articles brought by travellers into a sleeping or parlor car must be considered a necessary deposit, and therefore under Art. 1815, the company is responsible if the things be stolen by the company's servants or agents, or by strangers coming and going in the car, unless it has been shown that the loss has been caused by a stranger and has arisen from neglect or carelessness on the part of the person claiming.

SUPREME COURT OF CANADA.

OTTAWA, Nov. 16, 1891.

Quebec.]

BENNING et al. v. ATLANTIC & NORTH WEST RAILWAY Co.

Expropriation under Railway Act—R. S. C. ch. 109—Discretion of arbitrators—Award.

In a case of an award in expropriation proceedings it was held by two courts that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed, and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice. On appeal to the Supreme Court of Canada :

Held, that the judgments should not be interfered with.

Appeal dismissed with costs.

Laflamme, Q.C., and *Trenholme, Q.C.*, for appellants.

Geoffrion, Q.C., and *H. Abbott, Q.C.*, for respondents.

Quebec.]

OTTAWA, Nov. 17, 1891.

PETERS V. QUEBEC HARBOUR COMMISSIONERS.

*Contract—Engineer's certificate—Finality of—Bloc sum contract—
Deduction—Engineers, powers of—Interest.*

In a bulk sum contract for various works, executed and performed, and materials furnished on the Quebec Harbour Works, the contractors were allowed by the final certificate of the engineers a balance of \$52,011.

The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882, but the certificate was only granted on the 4th February, 1886. In an action brought by the contractors (appellants) for \$181,241 for alleged balance of contract price and extra work,

Held, 1st, that although the certificate of the engineers was binding on the parties and could not be set aside as regards any matter coming within the jurisdiction of the engineers, yet that such certificate can be corrected or reformed by the court where it is shown that the engineers have improperly deducted from the bulk sum contract price the sum of \$32,100 for an alleged error in the calculation of the quantities of dredging to be done, stated in the specification, and the quantities actually done.

2nd. That interest could not be computed from an earlier date than from the date of the final certificate, fixing the amount due to the contractors under the contract, viz. 4 February, 1886.

Strong and Gwynno, JJ., were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs.

Appeal and cross appeal allowed with costs.

Osler, Q.C., & Cook, Q.C., for appellants.

Irvine, Q.C., & Stuart, Q.C., for respondents.

Quebec.]

OTTAWA, Nov. 17, 1891.

PETRY et al. v. CAISSE D'ECONOMIE.

Bank Stock—Substituted property—Registration—Arts. 931, 938, 939, C. C.—Shares in trust—Conditio indebiti—Art. 1047, 1048, C. C.

The curator to the substitution of W. Petry, paid to the re-

spondents the sum of \$8,632, to redeem 34 shares of the capital stock of the Bank of Montreal entered on the books of the bank in the name of W. G. P. in trust, and which the said W. G. P., one of the *grevés* and manager of the estate, had pledged to respondent for advances made to him personally. H. P. *et al.*, appellants, representing the substitution, by their action seek to be refunded the money which they allege the Rev. J. P., one of them, had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to show they formed part of the estate, and no *acte d'emploi or remploi* to show that they were acquired with the assets of the estate.

Held, affirming the judgments of the courts below, 1st. *Per* Ritchie, C.J., & Fournier & Taschereau, JJ., that the debt having been paid with full knowledge of the facts the plaintiff could not recover.

2nd. *Per* Strong & Fournier, JJ. That bank stocks cannot be held as regards third parties in good faith to form part of substituted property on the ground that they have been purchased with monies belonging to the substitution, without an act of investment in the name of the substitution and a due registration thereof. Arts. 931, 938, 939 C. C. (Patterson, J., dissenting).

Appeal dismissed with costs.

Irvine, Q.U., & Stuart, Q.C., for appellants.

Hamel, Q.C., & Fitzpatrick, Q.C., for respondents.

New Brunswick.]

OTTAWA, June 22, 1891.

McKEAN v. JONES.

Practice—Proceedings in equity—Parties.

C., who had a suit pending on certain policies of insurance, assigned to defendant all his interest in said suit and said policies, and being indebted to B & Co., he gave them an order on defendant directing the latter to pay B. & Co. the balance coming from the insurance claim after paying what was due to defendant himself. B. & Co. indorsed the order and delivered it to plaintiff, who presented it to defendant, and defendant accepted it by writing his name across the face. B. & Co. afterwards gave plaintiff a written document stating that, having been informed that the order was not negotiable by indorsement, in order to perfect plaintiff's title they assigned and transferred to him the order, and made him their attorney, in their name, but for his own benefit, to collect the same.

The insurance monies having come into the hands of defendant he refused to give plaintiff an account or pay what was due to him, but stated that prior claims had exhausted the money. In an action for an account and payment the defendant demurred claiming that both C. and B. & Co. should be made parties. The demurrer was overruled and the same objection was raised in the answer. On appeal the question of want of parties was the only one argued.

Held, affirming the judgment of the Court below, Strong, J., dissenting, that the question was *res judicata* by the judgment on the demurrer; if not, the judgment was right as neither C. nor B. & Co. were necessary parties.

Appeal dismissed with costs.

Blair, A. G., and *Hazen* for appellant.

Weldon, Q. C., for respondent.

Manitoba].

OTTAWA, Nov. 16, 1891.

RURAL MUNICIPALITY OF CORNWALLIS V. THE CANADIAN
PACIFIC RAILWAY Co.

*Taxation—Exemption from—Lands sold or occupied—Crown
lands—Locus.*

By the charter of the C. P. R. Co. the lands of the company in the North West Territories, until sold or occupied, are exempt from Dominion, Provincial or municipal taxation for twenty years after the grant thereof from the Crown.

Held, affirming the judgment of the Court of Queen's Bench (Man.),

1. That an agreement to sell any of said lands, which has not been completed and no conveyance of which has been executed, does not take away the exemption, to effect which the land must be actually sold.

2. The exemption attaches to land allotted to the company before as well as after the patent is issued by the Crown.

3. Lands situate in the North West Territories do not lose the exemption by being afterwards incorporated within the boundaries of the Province of Manitoba on an extension thereof.

Appeal dismissed with costs.

Robinson, Q. C., and *Crawford* for the appellants.

S. H. Blake, Q. C., for the respondents.

Ontario.]

OTTAWA, Nov. 16, 1891.

QUIRT V. THE QUEEN.

*Constitutional Law—Validity of Dominion Acts—31 V. c. 17 (D)—
33 V. c. 50 (D)—Banking and incorporation of banks—Bank-
ruptcy and Insolvency—Taxation—Exemption—Crown Lands—
Beneficial interest of Crown.*

The Bank of U. C. was insolvent when the B. N. A. Act was passed, and all its property and assets had been transferred to trustees. By 31 V., c. 17, the Dominion Parliament ratified the assignment and constituted the trustees a body corporate with power to carry on the business of the bank so far as was necessary for winding up the same. By 33 V., c. 50, the same Parliament transferred all the property and assets of the bank to the Dominion Government. Subsequently a piece of land included in said assets was sold by the Government and a mortgage taken for the purchase money. This land was assessed by the municipality in which it was situate and sold for unpaid taxes. In a suit to set aside this tax sale :

Held, affirming the judgment (*sub nomine The Queen v. County of Wellington*) of the Court of Appeal (17 Ont. App. R. 615) that said acts of the Dominion Parliament were *intra vires*.

Per Ritchie, C. J. Parliament having legislative jurisdiction over "Banking and the Incorporation of Banks," and over "Bankruptcy and Insolvency," could pass the acts in question.

Per Strong, Taschereau and Patterson, JJ. The right of the Dominion Parliament to pass the said acts cannot be referred to its right to legislate with respect to "Banking and the Incorporation of Banks," but is derived from its jurisdiction over "Bankruptcy and Insolvency."

Held, also, that the Crown having a beneficial interest in the lands on which it held a mortgage, such lands were exempt from taxation and the tax sale was invalid.

Appeal dismissed with costs.

Bain, Q. C., for appellants.

Gamble, for respondents.

Manitoba.]

OTTAWA, Nov. 16, 1891.

BERNARDIN V. MUNICIPALITY OF NORTH DUFFERIN.

Contract—Corporation—Capacity to contract except under seal.

G. in answer to advertisement tendered for a contract to build

a bridge for the municipality of N. D. and his tender was accepted by resolution of the Municipal Council. No by-law was passed authorizing G. to do the work, but the bridge was built and partly paid for, and a balance remained unpaid for which B., to whom G. had assigned the contract, notice of the assignment having been given to the Council in writing, brought an action. This balance had been garnished by a creditor of G., but the only defence urged to the action was that there was no contract under seal, in the absence of which the corporation could not be held liable. On the trial there was produced a document signed by G. purporting to be the contract for the building of the bridge. It had no seal and was not signed by any officer of the municipality. The duplicate was alleged to have been mislaid in the office of the clerk of the municipality.

Held, reversing the judgment of the Court of Queen's Bench (Man.) (6 Man. L. R.) Ritchie, C.J., and Strong, J., dissenting, that the work having been executed and the corporation having accepted it, and enjoyed the benefit of it, they could not now be permitted to raise the defence that there was no liability on them because there was no contract under seal.

Appeal allowed with costs.

Tupper, Q.C., for appellant.

Osler, Q.C., and *Martin, Atty. Gen.*, of Manitoba, for respondent.

Manitoba.]

OTTAWA, NOV. 17, 1891.

MUNICIPALITY OF MORRIS V. THE LONDON & CANADIAN LOAN CO.

Municipality—Final judgment—Practice—Specially indorsed writ—Summary judgment on.

In an action against a municipality to recover the amount of certain debentures the writ of summons was specially indorsed, and defendants having appeared a summons was taken out according to the practice in the Court of Queen's Bench in such cases, calling upon said defendants to show cause at a day named why judgment should not be signed against them summarily. On the return of the summons the Judge before whom it was returnable, after hearing the parties, ordered that plaintiffs should be at liberty to enter up judgment in the action for the amount indorsed on the writ. This order was affirmed on appeal to the full court, and a further appeal was sought by the defendants to the Supreme Court of Canada.

Held, that the judgment sought to be appealed from was not a final judgment within the meaning of the Supreme Court Act, and no appeal therefrom would lie.

Appeal quashed with costs.

Chrysler, Q.C., for motion.

Hogg, Q.C., and *Crawford, contra*.

Ontario.]

HALTON ELECTION. LUSH V. WALDIE.

Election Petition—Appeal—Dissolution of Parliament—Return of Deposit.

In the interval between the taking of an appeal from a decision delivered on the 8th November, 1890, in a controverted election petition and the February sitting (1891) of the Supreme Court of Canada, Parliament was dissolved, and by the effect of the dissolution the petition dropped. The respondent subsequently, in order to have the costs that were awarded to him at the trial taxed and paid out of the money deposited in the Court below by the petitioner as security for costs, moved before a Judge of the Supreme Court in Chambers to have the appeal dismissed for want of prosecution, or to have the record remitted to the court below. The petitioner asserted his right to have his deposit returned to him.

Held, per Patterson, J., 1st. That the final determination of the right to costs being kept in suspense by the appeal the motion should be refused.

2nd. That inasmuch as the money deposited in the court below ought to be disposed of by an order of that Court, the Registrar of this Court should certify to that Court that the appeal was not heard, and that the petition dropped by reason of the dissolution of Parliament on the 2nd February, 1891.

Motion refused.

Kerr, Q.C., for motion.

Aylesworth, Q.C., *contra*.

COURT OF QUEEN'S BENCH—MONTREAL.

Action for reformation of account—Form of judgment therein—Desistment from part of judgment—Costs.

Held :—1. In an action against an agent for reformation of an

account rendered, where the judgment ordered the account to be reformed within thirty days, by adding to the balance stated, certain sums proved to have been omitted in the account, and the judgment proceeded to condemn the defendant to pay the amount omitted, before the balance due and payable had been established in due course of law, that the latter part of such judgment is irregular and erroneous.

2. Where the plaintiff desisted from the latter part of the judgment above mentioned, and obtained *acte of désistement*, pending an appeal by the defendant from the judgment, that the respondent should be held only for the costs of the appeal up to the time when he obtained *acte of désistement* as aforesaid, and that the appellant having failed on the other grounds of appeal, should be condemned to pay the costs of the appeal from the date when *acte* was obtained.—*Stephens & Gillespie*, Lacoste, C. J., Baby, Bossé, Wurtele, JJ., Sept. 26, 1891.

Taxation—Insane Asylum—Charitable institution—Exemption—
R. S. Q. 2044, 6146.

Held:—That an asylum for the insane, established and incorporated by an Act of the legislature, and supported chiefly by voluntary donations, the members of the corporation individually deriving no profit from the institution, is a charitable institution within the meaning of R. S. Q. 2044, 6146, and therefore exempt from the payment of municipal and school taxes.—*Corporation of Verdun & Protestant Hospital for the Insane*, Lacoste, C.J., Baby, Bossé, Wurtele, JJ., Sept. 27, 1891.

PROCEEDINGS IN APPEAL—MONTREAL.

Friday, January 15.

The Court adjourned, the parties not being ready to proceed in any case.

Saturday, January 16.

Commission of Mr. Justice Hall read. Commissions of Justices Wurtele and Ouimet read, the former to replace Mr. Justice Cross, during his leave of absence, and the latter to replace Mr. Justice Baby during the term.

Menard dit Bonenfant & Bryson.—Appeal from judgment of the Court of Review, Montreal, Jan. 31, 1891. Part heard.

Monday, January 18.

Villeneuve & Kent.—Confirmed, Blanchet, J., diss.

Desjardins & Robert, & Laviolette.—Confirmed as to costs of the action *en garantie*. Principal action dismissed with costs. Action *en garantie* maintained, with costs of contestation against defendant *en garantie*. In appeal the appellant succeeds against one of the respondents (Robert) with costs, but fails as to the other (Laviolette), with costs in favour of the latter.

Great North Western Telegraph Co. & Laurance.—Confirmed.

Magor & Kehlor.—Confirmed.

Trester & Canadian Pacific R. Co.—Confirmed.

Hebert & Wright, & Beauharnois Junction R. Co.—Confirmed.

Merchants Bank of Canada & Cunningham.—Confirmed.

Lefuntun & Veronneau.—Confirmed.

Banque Jacques Cartier & Leblanc.—Reversed.

Corporation Dissident School Trustees of Cote St. Paul & Brunet, & Davidson.—Confirmed.

Norman & Shaw.—Motion of appellant, to be allowed to give security, granted, without costs.

Glasgow & London Ins. Co. & Canadian liquidators.—Settled out of court.

Menard dit Bonenfant & Bryson.—Hearing concluded. C.A.V.

Woods & The Queen.—Motion by the Crown to dismiss writ of error, the plaintiff in error having made default to appear. C.A.V.

McCaffrey & Ontario Bank.—Appeal from interlocutory judgment of the Superior Court, Montreal, Jetté, J., June 5, 1891. C.A.V.

Mongenais & Allan.—Appeal from judgment of the Superior Court, Montreal, Taschereau, J., June 27, 1891.—Part heard.

Tuesday, January 19.

Cie. Chemin de fer Atlantique & Trudeau.—Re-hearing ordered.

Mongenais & Allan.—Hearing concluded. C.A.V.

Canada Investment & Agency Co. & McGregor.—Appeal from judgment of the Superior Court, Montreal, Pagnuelo, J., May 30, 1890.—Part heard.

Wednesday, January 20.

The Court did not sit, this day having been appointed for the funeral of H.R.H. the Duke of Clarence.

Thursday, January 21.

Canadian Bank of Commerce & Stevenson.—Re-hearing ordered.

Ives & Parmelee.—Motion for leave to appeal from an interlocutory judgment dismissing an exception to the form.—C.A.V.

Church & Bernier.—Appeal from judgment of the Superior Court, St. Hyacinthe, Tellier, J., Dec. 31, 1888.—Heard. C.A.V.

Casselman Lumber Co. & Naylor.—Motion for leave to appeal from an interlocutory judgment.—C.A.V.

Powers & Martindale.—Appeal from the judgment of the Superior Court, Bedford, Tait, J., Nov. 24, 1887.—Part heard.

Friday, January 22.

Powers & Martindale.—Hearing concluded. C.A.V.

City of Sorel & Provost.—Appeal from judgment of the Superior Court, Richelieu, Ouimet, J., June 4, 1890. Heard. C.A.V.

Canada Atlantic R.Co. & Poirier.—Appeal from judgment of the Circuit Court, Beauharnois, Belanger, J., Nov. 5, 1890.—Heard. C.A.V.

Plante & Corporation du Village de St. Jean de Matha.—Appeal from judgment of the Court of Review, Montreal, Jan. 31, 1890.—Part heard.

Saturday, January 23.

Geddes & City & District Savings Bank.—Motion for leave to appeal from an interlocutory judgment. C.A.V.

Plante & Corporation du Village de St. Jean de Matha.—Hearing concluded. C.A.V.

Lapierre & Rodier.—Appeal from judgment of the Superior Court, Montreal, Davidson, J., June 30, 1890.—Part heard.

Monday, January 25.

Geddes & City and District Savings Bank.—Motion for leave to appeal from an interlocutory judgment dismissed.

Canada Investment & Agency Co. & McGregor.—Hearing concluded.—C.A.V.

Tuesday, January 26.

Bank of B. N. A. & Stewart.—Confirmed, Bossé and Blanchet, JJ., dissenting.

Travellers Insurance Company & Turnbull.—Motion for leave to appeal rejected, Bossé, J., dissenting.

Parker & Langridge.—Confirmed.

Bedard & Cusson.—Reformed, and damages reduced to \$100, with costs of appeal against respondent.

Canada Railway News Co. & Mutual News Co.—Confirmed.

McCaffrey & Ontario Bank.—Reversed. Leave to file plea within eight days on payment of \$30.

Ives & Parmalee.—Motion for leave to appeal rejected.

Casselman Lumber Co. & Naylor.—Motion for leave to appeal rejected.

Woods & The Queen.—Writ of error dismissed by default.

Lapierre & Rodier.—Hearing concluded. C.A.V.

Vallée & Préfontaine; Dufresne & Préfontaine.—Appeal from judgment of the Superior Court, Montreal, Tellier, J., Jan. 31, 1890.—Part heard.

Wednesday, January 27.

The following appeals were dismissed, no proceedings being had within the year :—*Commissaires Chemins à barrières & Cité de Montréal; Besette & Paradis; Beaumont & C. P. R.; Mitchison & Childs; Pominville & Decary; Pontiac Junction R. Co. & Mahoney; Dion & Gervais.*

Vallée & Préfontaine; Dufresne & Préfontaine.—Hearing concluded.—C.A.V.

Cadieux & Taché.—Appeal from judgment of the Superior Court, Montreal, Davidson, J.—Part heard.

The Court adjourned to Feb. 17.

Cases en délibéré after January term :—

Marsan & Gaudet; Menard dit Bonenfant & Bryson; Mongenais & Allan; Church & Bernier; Powers & Martindale; Cité de Sorel & Provost; Canada Atlantic R. Co. & Poirier; Plante & Corporation St. Jean de Matha; Canada Investment & Agency Co. & McGregor; McGregor & Canada Investment & Agency Co.; Lapierre & Rodier; Vallée & Préfontaine; Dufresne & Préfontaine.

INSOLVENT NOTICES.

Quebec Official Gazette, Jan. 16, 23, 30.

Judicial Abandonments.

BERTRAND, David, Trois Pistoles, Jan. 20.

CHOINIERE, Louis, St. Pie, Jan. 23.

CLEMENT & BOIVIN, Quebec, Jan. 12.

CLERMONT, Edmond, crockery-dealer, Montreal, Jan. 7.

DEMERS, Jean Bte., tanner, St. Julie de Somerset, Jan. 25.

FALARDEAU & PAQUET, tanners and curriers, Quebec, Jan. 18.

GALIBOIS, François D., hotel-keeper, Quebec, Jan. 27.

GODIN, Eugène, grocer, Montreal, Jan. 14.

GOURDEAU, Félix, Quebec, Jan. 27.

HEARLE, James G., soap manufacturer, Montreal, Jan. 13.
HOOD, Mann & Co., Montreal, Jan. 18.
HUDON, Pierre, Montreal, Jan. 7.
LANGIN, Dame Philomène, St. Hyacinthe, Jan. 13.
LANGLOIS & Langlois, manufacturers, Quebec, Jan. 8.
MILBUENE, Robert John, cigar-dealer, Montreal, Jan. 7.
PITON, Alphonse, hotel keeper, Quebec, Jan. 25.
RHÉAULT, Dame D., St. Albert de Warwick, Jan. 13.
RITCHIE, John, boot and shoe manufacturer, Quebec, Jan. 9.
SAMSON, Thomas J., Arthabaskaville, Jan. 25.
THIBAUDEAU, Honoré, Stanfold, Jan. 25.
WATERS Bros & Co., printers and publishers, Montreal, Jan. 18.
WALTERS, Adam, grocer, Quebec, Jan. 25.

Curators Appointed.

BRISEBOIS, Pierre.—C. Desmarteau, Montreal, curator, Jan. 7.
BROWN & Son, Jas., Montreal.—A. W. Stevenson, Montreal, curator, Jan. 12.
CLEMENT & Boivin, Quebec.—D. Arcand, Quebec, curator, Jan. 25.
CLERMONT, El., Montreal.—C. Desmarteau, Montreal, curator, Jan. 14.
DUFOUR, Toussaint, Montreal.—L. U. Deschamps, Montreal, curator, Jan. 18.
DUBAND, Dame Eléonore, St. Albert de Warwick.—Kent & Turcotte, Montreal, joint curator, Jan. 25.
GIGUÈRE, Richard.—N. Lambert, St. Joseph, Beauce, curator, Jan. 23.
GODIN, Eugène.—L. G. G. Beliveau, Montreal, curator, Jan. 22.
GAUTHIER, Adelard.—Kent & Turcotte, Montreal, joint curator, Jan. 15.
HEARLE, Jas. G., Montreal.—W. A. Caldwell, Montreal, curator, Jan. 23.
HUBBELL & Brown, Montreal.—A. F. Riddell, Montreal, curator, Jan. 28.
HUDON, Pierre, Montreal.—A. F. Riddell, Montreal, curator, Jan. 18.
LANGLOIS, Joseph, Ste. Scholastique.—D. Seath, Montreal, curator, Dec. 29.
LANGLOIS & Langlois, Quebec.—D. Arcand, Quebec, curator, Jan. 20.
LEFEBVRE, Odina, Quebec.—N. Matte, Quebec, curator, Jan. 18.
MARCEAU, Evariste.—N. Matte, Quebec, curator, Jan. 12.

- MILBURN, R. J., Montreal.—C. Desmarteau, Montreal, curator, Jan. 14.
- MOONEY & Co., Geo. A., Montreal.—A. F. Riddell, Montreal, curator, Jan. 23.
- PATERSON & Co., John A., Montreal.—A. W. Stevenson, Montreal, curator, Jan. 12.
- PELLETIER, Magloire.—Royer & Burrage, Sherbrooke, joint curator, Jan. 25.
- RIEPERT & Co., Montreal.—Kent & Turcotte, Montreal, joint curator, Jan. 15.
- RITCHIE, John, Quebec.—D. Arcand, Quebec, curator, Jan. 20.
- TESSIER, Frs., Dewitville.—C. Desmarteau, Montreal, curator, Jan. 18.
- TOUCHETTE, Joseph *alias* Zozime, St. Paul d'Abbotsford.—J. O. Dion, St. Hyacinthe, curator, Jan. 9.
- TRUDEAU, S. G. and J. F., Stanbridge Station.—E. W. Morgan, Bedford, curator, Jan. 15.
- TURGEON, Darveau & Co., Quebec.—N. Matte, Quebec, curator, Jan. 20.
- VANANDAIGUE *dit* GADROIS, André, St. Ephrem d'Upton.—J. O. Dion, St. Hyacinthe, curator, Jan. 9.
- VINEBERG, Harris, Montreal.—Kent & Turcotte, Montreal, joint curator, Jan. 25.
- WATERS Bros. & Co.—P. A. Crosby, Montreal, curator, Jan. 28.

Dividends.

- AMYOT, Exias.—First and final dividend, payable Feb. 5, C. Desmarteau, Montreal, curator.
- BEAUDET & Chinic, Quebec.—First dividend, payable Feb. 17, D. Rattray, Quebec, curator.
- BEAUDRY & fils, E., Weedon.—First and final dividend on proceeds of real estate, payable Feb. 19, Millier & Griffith, Sherbrooke, joint curator.
- BERGEVIN, L. A. & Roy, Quebec.—First and final dividend, payable Feb. 2, H. A. Bedard, Quebec, curator.
- BLAIS, Dame D. H., St. Moïse.—First and final dividend, payable Feb. 16, H. A. Bedard, Quebec, curator.
- COSSETTE & Co., O., Valleyfield.—First dividend, payable Feb. 11, C. Desmarteau, Montreal, curator.
- GABOURY, A., Montreal.—First dividend, payable Feb. 16, Kent & Turcotte, Montreal, joint curator.
- GAGNÉ, Jacob, Rimouski.—First dividend, payable Feb. 16, H. A. Bedard, Quebec, curator.

- JOLICOEUR, Moïse (Jolicoeur & Drolet), Montreal.—First and final dividend, payable Feb. 10, D. Seath, Montreal, curator.
- JULIEN & Co., Edm., Hedleyville.—Second and final dividend, payable Jan. 31, N. Matte, Quebec, curator.
- LANTHIER, A., Montreal.—First and final dividend, payable Feb. 12, C. Desmarteau, Montreal, curator.
- LAPOINTE, George.—First and final dividend, payable Feb. 17, T. Gauthier, Montreal, curator.
- LETOURNEAUX, Jean.—First and final dividend, payable Jan. 30, J. M. Marcotte, Montreal, curator.
- MACLEAN, Shaw & Co., Montreal.—First and final dividend, payable Feb. 16, W. A. Caldwell, Montreal, curator.
- MAILLET, Jos.—Second and final dividend, payable Feb. 3, C. Desmarteau, Montreal, curator.
- MORRISSETTE, N. E.—First and final dividend, payable Jan. 25, F. Valentine, Three Rivers, curator.
- NICOL, V., Quebec.—First and final dividend, payable Feb. 16, H. A. Bedard, Quebec, curator.
- ROBITAILLE, S.—First and final dividend, payable Feb. 6, C. Desmarteau, Montreal, curator.
- SAMSON, W. S., Windsor Mills.—First dividend, payable Feb. 9, J. Hyde, Montreal, curator.
- SNOWDON & Co., C.C., Montreal.—First and final dividend, payable Jan. 29, P. S. Ross, Montreal, curator.
- TANGUAY & Lafleur, Quebec.—First and final dividend, payable Feb. 2, H. A. Bedard, Quebec, curator.

GENERAL NOTES.

LIMITS OF CROSS-EXAMINATION.—The *Law Journal* in reference to a recent *cause célèbre* in the Divorce Court, observes:—"The mere suggestion of a certain class of offence is enough to wreck the happiness and shatter the nervous system of many men. It is, therefore, nothing less than wanton cruelty to put such a weapon into the hands of counsel unless something much stronger than bare suspicion justifies its use. If this can be said of the sterner sex, it is surely not too much to expect a more chivalrous sense of duty when a woman's chastity is in question. So long as the rules of cross-examining remain as at present, the public have a right to look to the leaders of the bar for protection against any abuse of so powerful a weapon for good or evil, and if at any time they look in vain, public opinion (which is very strong on this subject) will certainly make itself heard and felt in other quarters."

THE LEGAL NEWS.

VOL. XV.

MARCH 1 & 15, 1892.

No. 5 & 6.

CURRENT TOPICS AND CASES.

In *Illinois Central R. Co. v. City of Chicago*, Jan. 30, 1892, the principal question was as to the power of the city to extend its streets across a railroad. The Court (Circuit Court, Cook Co.) held that the railroad company took its charter and acquired its right of way subject to the right of the State, by itself or its accredited representatives, the municipalities, to exercise the right of eminent domain, and to extend public highways and streets across the railroad whenever the public exigency demands it. The railroad must, in this, yield to the municipality, a governmental agency representing the public at large. Railroads take their charter subject to the exercise of the police power by the State, or by its agencies, the municipalities, in which is the power to compel railroad companies, at their own expense, to provide and maintain crossings for the safety of the public and the prevention of accidents. The *Chicago Legal News* of Feb. 13, in which the case is reported, says: "The decision of the Court in this case has been watched with much interest by those operating railroads, or administering municipal government. It follows in line with the opinion delivered by Chief Justice Magruder, published in this issue, and would, therefore, seem to be next thing to a Supreme Court opinion."

In *Banque Jacques Cartier & Leblanc*, Court of Queen's Bench, Montreal, Jan. 18, the Court held that a party who, before maturity, has become the holder of a promissory note in good faith and without notice of any objection, for valuable consideration, is entitled to recover the amount thereof from the person whose signature appears on the note as maker, even where it is proved that the signature was obtained by artifice and fraud, and without any consideration being received by the promissor. The conclusion arrived at in this case varies from that stated by the Court of Appeal in *Exchange Bank of Canada & Carle*, M. L. R., 3 Q. B. 61, in which an appeal by a bank, in another case connected with the Mahan frauds, was dismissed. It will be observed, however, that in *Exchange Bank & Carle*, the Court of Queen's Bench was of opinion that Baxter, for whom the bank was merely a *prête-nom*, had reason to be aware of the fraud by which the note had been obtained from the maker; and moreover, that it was not proved that Baxter had given consideration for the note.

In *Lavoie v. Lacroix*, Superior Court, district of Bedford, Lynch, J., Jan. 14, 1892, the Court held that where the sale of movables under writ of execution has been retarded by an opposition filed by the defendant, and the day fixed for the return of the writ has passed without an order having been obtained from the Court or Judge extending the return day, the seizure lapses. The same thing was held by the Court of Review, Montreal, in *Fletcher v. Smith*, 2 Leg. News, 117.

In *Beaulne v. Fortier*, noted in the present issue, Mr. Justice Taschereau made an announcement which requires the attention of the bar. The plaintiff asked for leave to sue *in formâ pauperis*, in an action for alimentary allowance. His Honor remarked that formerly these actions were always brought in the Circuit Court, which had the effect of preventing large costs, which the parties could ill afford to pay. He added that after consultation

with his colleagues the bench had determined to refuse leave to sue *in forma pauperis* in such cases unless the actions were brought in the Circuit Court. This decision will prevent useless costs to a class of litigants to whom a heavy bill of costs is an intolerable evil.

THE ACTION UNDER ART. 1056, C.C.

Few cases have attracted more attention from the bar than *C.P.R. Co. & Robinson*; it might probably be added with truth that few judgments pronounced by the Supreme Court have caused so much surprise. The majority and dissentient opinions will be found in the present issue.

It will be observed that the action is brought under Art. 1056 of the Civil Code, by the widow of a man who was fatally injured while in the service of the Company, and died somewhat more than a year afterwards. The case has a peculiar history. It was twice tried before special juries. After each trial it was carried through all the courts. On the first occasion, after judgment had been rendered in favour of the plaintiff by the Court of Queen's Bench, the Supreme Court ordered a new trial. The defendants before proceeding to the second trial obtained leave to amend their pleas. A second trial took place, the verdict being again in favor of the plaintiff Robinson. It was only after all this litigation, which had extended over six or seven years, that a construction of Art. 1056 which had not occurred to the learned counsel for the defence in all this time, and which apparently had never occurred to any member of the courts through which the case had passed, was suggested at the argument before the Court of Review, after the second jury trial. The suggestion was this: That a year had elapsed before the death of the injured person; that the action for bodily injuries is prescribed by one year; that at the date of death the injured person had therefore no right of action if death had not ensued; that Art. 1056 assumes

there is a subsisting right of action at the date of death, which the injured person might have exercised if death had not ensued ; and therefore on the face of the declaration no right was shown to the remedy under Art. 1056. One judge of the three who sat in Review sustained this pretention, but the Court of Queen's Bench unanimously pronounced against it. The late Sir A. A. Dorion, who delivered the judgment of the Court, stated his conviction very strongly that the question of prescription of the husband's claim could not affect the right of the wife, provided she sued within a year after his death ; that the action of the widow under Art. 1056 is a new and distinct action, given to her whenever the husband dies without having obtained indemnity. The case went to the Supreme Court for the second time, and there Mr. Justice Fournier was equally positive that the widow's right was not affected by prescription against the husband ; but Mr. Justice Taschereau, whose opinion was concurred in by the other members of the Court, held the contrary.

We find, therefore, that eight judges in all support the widow's claim, (the eight being all from the bar of this province), while six judges (two only from this province), hold that it does not exist.

That the terms of Art. 1056 are tolerably clear in themselves is abundantly evident from the fact that during half a dozen years of litigation everybody interpreted them in the same way. No question was raised as to their meaning. The article reads : " In all cases where " the person injured by the commission of an offence or " a quasi offence dies in consequence, *without having* " *obtained indemnity or satisfaction*, his consort and his ascendant and descendant relations have a right, *but only* " *within a year after his death*, to recover from the person " who committed the offence or quasi offence, or his representatives, all damages occasioned by such death." The majority of the Supreme Court, apparently, would add to the words " without having obtained indemnity or satisfaction," the words " or without a sufficient time

‘ to prescribe the action of the injured person having “ elapsed before the death.”

As the case has been removed to a higher Court we have no disposition to discuss the question here. Mr. Justice Taschereau has, in the opinion which will be found in the present issue, urged with considerable force and ingenuity the view that there must be a claim subsisting at the time of death. It seems to us that there is a reason why prescription of the husband's claim should have nothing to do with the action under Art. 1056. The effect of this article is to relieve a person fatally injured from the burden of suing for damages during the fragment of life left to him. He may accept indemnity, but if indemnity be withheld he knows that his widow and children will have a valid claim after his death. A man fatally injured cannot easily foresee how long he may survive. It is of course a very unusual thing for death to be deferred for a year. Would it not be a hardship as well as an absurdity that a dying man who sees the year drawing to an end, should in his last days be under an obligation to institute a suit? And to what end? Not with the expectation of arriving at a judgment, for he may not have a week of life; but he is told that he must do this solely to interrupt prescription and prevent his wife's claim from being lost.

There must be a claim, it is said, subsisting at the moment of death. But in the next clause of the article the action is given to the widow of a person dying from wounds received in a duel, even against the seconds and witnesses. A person mortally wounded would have no claim which he could urge, against his antagonist or those present. So there is no subsisting claim in that case.

The Judicial Committee has granted special leave to appeal. We had an opportunity, in July last, of hearing the argument before their lordships. The history of the case and the grounds of the judgment of the Supreme Court were very fully entered into, Mr. Digby of the

English bar representing the petitioner, and Mr. H. Abbott the respondents. Their lordships, after a few minutes, private deliberation, delivered the judgment which will be found on another page, granting special leave to appeal.

In these remarks we have not referred to the question whether the action for bodily injuries is prescribed by one or two years in a case like the present. The Code is not free from difficulty, and whatever may be the construction put upon it, it must be conceded that one year is a very inadequate time. Injuries may be received which do not develop themselves, and the extent of which cannot be accurately estimated, within a twelve month from the time of the accident. In England the prescription is six years, so that a point like that raised in the *Robinson* case is never likely to arise there.

SUPREME COURT OF CANADA.

OTTAWA, June 22, 1891.

Coram RITCHIE, C.J., STRONG, FOURNIER, TASCHEREAU, GWYNNE and PATTERSON, JJ.

CANADIAN PACIFIC R. Co. (defendants), appellants, and ROBINSON (plaintiff), respondent.

Art. 1056, C. C.—Action under—Action for bodily injuries—Prescription—Art. 2262, C. C.—Art. 433, C. C. P.

HELD:—1. Art. 1056, C. C., gives the widow, or other relatives therein mentioned, a right of action only when at the death of the injured person there was a subsisting right of action which, had death not ensued, he might have exercised. Therefore if the injured person's claim was prescribed before his death the widow has no action under Art. 1056.

2. That actions for quasi offences causing bodily injuries are prescribed by one year.

3. That where the allegations of the plaintiff are not sufficient in law to sustain his pretensions, the Court may render judgment in favor of the defendant, notwithstanding that the verdict of the jury is upon matters of fact in favor of the plaintiff.

APPEAL from a judgment of the Court of Queen's Bench, Montreal, reported in M. L. R., 6 Q. B. 118.

TASCHEREAU, J.:—

By Sec. 1 of ch. 78, C.S.C., it is enacted that "Whenever the death of a person has been caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony." Since this case was before this Court in 1887, as reported in 14 Supr. C. 105, that Statute has been expressly repealed by the Revised Statutes of Quebec, Appendix A; but under 50 Vic. ch. 5, Secs. 5, 6, 7, such repeal, could it otherwise do so, does not affect the present case. Then I do not see that it adds anything to the repeal enacted by Art. 2613, C.C., of all previous laws on matters upon which express provision is made in the Code. So that, for our determination of the case as now presented to us, the law is precisely the same as it was upon the former appeal.

Now, I take it to be concluded by the judgment of this Court upon that appeal that this action, avowedly brought under Art. 1056 of the Code, is nothing else but the statutory action given in England by Lord Campbell's Act, and consequently, that, in expounding the law as to its nature and the principles upon which it rests, we must be guided by the same considerations, and governed by the same rules, that have been authoritatively adopted and recognized in the construction of that Act. And one of these rules, I would say to-day an uncontroverted one, is that, under the Act, the widow or other relatives therein mentioned have no action, if at the time of his death, the deceased had none.

The leading case on the question is *Read v. Great Eastern, L.R.*, 3 Q.B. 555, where it was determined, upon that principle, that if the deceased had accepted any compensation in satisfaction of his claim against the defendant, the personal representatives are debarred from bringing any action under the Statute. The Statute does not give any new right of action or a fresh cause of action, said the Court, and if the deceased has received compensation he could "not have maintained an action and recovered damages in respect thereof in the very words of the Statute, so this plaintiff has herself no action." And as Lush, J., said in the same case, as reported in 9 B. & S: "The Statute gives a

"right of action when there *was at the time* of the death a *subsisting* cause of action."

In *Haigh v. Royal Mail Steam Packet Co.*, 52 L.J.Q.B. 640, Brett, M.R., speaking of the same Statute said, "under which, it is clear, the executors can only recover if the deceased man could have recovered, supposing that everything did happen to him which, had he not been killed, would have entitled him to bring an action."

I refer also to *Armsworth v. South Eastern*, 11 Jur. 758; *Tucker v. Chaplin*, 2 C. & R. 730; *Boulter v. Webster*, 11 L. J. N. S. 598. In *Griffiths v. The Earl of Dudley*, 9 Q. B. D. 357, on the same principle, again, it was held that if the deceased, being a workman, had contracted for himself or his representatives with his employer not to claim compensation for personal injury, whether resulting in death or not, his widow had no action under Lord Campbell's Act for the damages resulting to her from his death. The plaintiff had argued that the Act gives a separate and independent right to the widow and children of a person killed, a right wholly separate from any right existing in the decedent's legal representatives, to recover for injuries to his personal estate. But, said Field, J., "*Read v. Great Eastern* is a clear decision that Lord Campbell's Act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived." And Cave, J., added, "It was argued that whether or not the deceased could have bargained away his own right to recover damages, he could not bargain away the right of his family under Lord Campbell's Act. That Act was passed because it was thought a hardship that, where a man sustained personal injuries, and died without having himself recovered compensation, leaving behind him persons in certain degrees of relationship, those persons should not be entitled to bring an action. *Read v. Great Eastern* has decided that the Act gives no new cause of action to the relatives, but only a right in substitution for the right of action which the deceased would have had if he had survived."

And in *Senior v. Ward*, 1 Ell. & Ell. 385, Lord Campbell, C. J., said, "We conceive that the legislature in passing the statute upon which the action is brought, intended to give an action to the representatives of a person killed by negligence only where, had he survived, he himself, at the common law, could have maintained an action against the person guilty of the alleged

"negligence." It is true that, in *Pym v. Great Northern*, 4 B. & S. 396, in the Exchequer Chamber, Erle, C.J., said:—"The statute as appears to me, gives to the personal representative a cause of action beyond that which the deceased would have had if he had survived; and based on different principles." But that sentence is used merely in reference to the extent of the damages that can be recovered in an action under the Act; and the words "cause of action," as the context of the judgment clearly shows, simply refer to those damages. The same remark applies to *Blake v. Midland*, 18 Q. B., where it was said that—"The Statute does not transfer this right of action to the representative, but gives him a totally new right of action." In that case also the only question under consideration was the nature and extent of the damages recoverable in an action under the Act.

In *Seward v. The Vera Cruz*, 10 App. Cas. 59, in the House of Lords, where the point under consideration was, whether the Admiralty Court had jurisdiction in an action under the Act, though Lord Selborne said that the Act gives a new cause of action, and Lord Blackburn (who, in *Read v. Great Eastern*, had said, "The Statute does not give a new right of action") added, "An action new in its species, new in its quality, new in its principle, and in every way new," there was not a single expression thrown out that could be interpreted as questioning the decision in *Read v. Great Eastern*, or as casting the least doubt on the doctrine that, to maintain an action under the Act, there must have been, at the time of the death for which damages are claimed, a subsisting cause of action, and that, when the deceased, either voluntarily or involuntarily, had placed himself in a position that, had he survived, he could not at the time of death, have brought an action for his personal injury, no new right of action had been conferred to replace that which, through his own conduct, had never arisen or had been extinguished. *Beven, on Negligence*, 185.

In the United States, a similar statute has received the same construction in the following cases. In *Dibble v. New York*, 25 Barb. 183, the defendants had settled with the deceased his claim for his injuries. The Judge at the trial had charged the jury that this settlement could not affect the widow's action, which was given to her by the Statute for the damages she had sustained by reason of her husband's death. But the Court held that such was not the law, and that "The right to such an action depends not only upon the character of the act from which

"death ensued, but upon the condition of the decedent's claim at the time of his death, and if the claim was in such a shape that he could not then have enforced it, had death not ensued, the statute gives the executors no right of action, and creates no liability whatever on the part of the person inflicting the injury." Johnson, J., for the Court, said, "When death ensued, therefore, the deceased had no subsisting cause of action, nor could he have maintained any action and recovered any damages, in respect of the act or the injury, if death had not ensued. The right of action which he might have enforced had he survived the injury, upon his death accrues to the personal representative. And it is given for the same wrongful act or neglect. That is the essential foundation of the action in either case. The wrong to be redressed is the same in both cases, but the injury flowing from the wrong to be compensated is different. The person injured is compensated for the injury to his person, the others for the injury they sustain from the death of the injured person. If the person injured obtains satisfaction by action or by voluntary settlement and payment before death ensues, the wrongful act which caused the injury and all its consequences past and future, are included, and the whole cancelled together, and the liability of the person inflicting the injury ended..... The object of the statute was to continue the cause of actionfor the benefit of the widow and next of kin to enable them to obtain their damages resulting from the same primary cause, and not to create an entirely new additional right of action."

And Comstock, C. J., in the same case, in appeal, reported in *Whitford v. The Panama*, 23 N.Y. 484, said: "No new cause of action is created by the legislature, but the cause which, by the rules of the common law, has become lapsed or lost by the death of the person to whom it belonged, is continued and devolved upon his administrator. The opposing argument is founded wholly on the idea that the cause of suit by the administrator is the death of the party, and not the wrongful assault or negligent conduct by which it is occasioned.....In the view of the Statute, therefore, the right to be enforced is not an original one, springing into existence from the death of the intestate, but is one having a previous existence, with the incident or survivorship derived from the statute itself. The true point of inquiry is whether a wrong of this nature, result-

"ing in death, affords more than a single cause of action. Now
"to affirm that, in cases of this nature, two causes of suit arise,
"one in favor of the decedent in his lifetime, the other founded
"on his death, is to depart from the plainest legal analogies."

In *Littlewood v. The Mayor*, 89 N.Y. 24, also, where the deceased had recovered before his death for his damages, an action by his widow was held not to be maintainable.

Rappallo, J., for the Court, said :—"It seems to me very evident that the only defence of which the wrongdoer was intended to be deprived was that afforded him by the death of the party injured, and that it is to say the least, assumed throughout the Act that, at the time of such death, the defendant was liable. The Statute may well be construed as meaning that the party who, at the time of the bringing of the action, would have been liable if death had not ensued, shall be liable to an action notwithstanding the death."

In *Fowlkes v. The N. & D. R. R. Co.*, 5 Baxter, 663, the statute governing the case decreed, in one of its sections, that the right of action which a person who dies from injuries received from another, or where death is caused by the wrongful act or omission of another, would have had against a wrongdoer, in case death had not ensued, would not abate or be extinguished by his death, but was to pass to his personal representative for the benefit of his widow and next of kin. There was no statute of limitation expressly applicable to that class of cases. But, by another section of the statute, it was provided that actions for personal injuries should be commenced within one year after the cause of action accrued. The Court held that, under this last section, the cause of the survivors' action accrued when the injury was received, or at the time of the wrongful act or omission, and that consequently, as to their action, the statutory limitation of one year began to run from that time, as it would have for the decedent's action itself had he survived his injuries. "Their action," says the Court, "is brought for the same cause as if the injured party had himself brought the action, and it is not the death of the injured party that is the cause of the survivors' action. The argument that the action allowed by the statute is a new action given to the personal representative, an action that the injured party could not have maintained, and that the action is given on account of the death, though plausible, is not sound."

Now, applying these considerations to the present case, I am

of opinion that the respondent's argument here in answer to the appellant's motion, that her action is not an action transmitted to her by the deceased, but that it is a new action, entirely different from that which the deceased had in his lifetime for his injuries, is, as against the motion, unfounded in law and cannot support her claim. Of course, her action was not transmitted to her by the deceased. He never had an action for damages resulting from his own death. And her action is different in this, that she claims the damages resulting from his death, whilst he would have claimed the damages resulting from the injury to himself; in other words, he would have claimed *his* damages, whilst she claims *her own* damages. (*Pym v. Great Northern*, 2 B. & S. 759.) But what is the cause of action in both cases? Where did it originate? What gave birth to any right of action at all against the appellants? Is it not their negligent act from which the deceased suffered an injury? Is not the respondent's action for her damages based, as it could not but be, on that negligent act, as an action by the deceased for his own damages must itself have been? There is unquestionably only one article of the Code under which the appellants' liability attaches, as tortfeasors; that is, Art. 1053, which enacts that every person is responsible for the damage caused by his fault to another. On that article only did an action by the deceased lie, and on that article only does the basis of the respondent's action rest. The action is a new action, as to her, in one sense. It is the creature of the Statute or of Art. 1056, and is new, entirely new, in that respect. It originated for her at her husband's death, and is for damages that, for him, did not exist. But the measure of her right to have the appellants declared responsible towards her is to be ascertained by the rights the deceased himself had against them; and there is attached to her right of action the implied statutory condition that at the time of his death her husband himself had a right of action. If his right was then gone, if the appellants were freed from any liability towards him, she has no claim. The statute and the article of the Code extend the remedy to her, but do not revive the appellants' liability, if it had been extinguished. They simply give her the right to avail herself of the right to the action the deceased had at his death, enlarging its scope so as to embrace the actual pecuniary damages resulting to her from the death.

The article of the Code may not be so clear on this as the statute was. But in construing it, as it is not given as new law,

it has to be taken as a purely declaratory enactment (*Wardle v. Bethune*, in the Privy Council, 8 Moo., P. C. C. 223), and as such conferring no new or additional rights, apart from the damages, upon the widow and other surviving relatives therein mentioned. And the fact that it was not in the Code as presented to the Legislature, but was subsequently inserted by the commissioners as an omission in their report of a subsisting law, is confirmatory of that view. They cannot be presumed to have intended to make in that law a change they had no power to make; and before coming to the conclusion that they have inadvertently done so, we must carefully ascertain that there is no room whatever for a different construction. Moreover, when, by an express enactment, given as pre-existing law, two years before the decision in *Read v. Great Eastern*, the Code decreed that payment and satisfaction to the deceased for his damages bars the survivors' action for their damages, it clearly recognized that their action is not the so totally separate and independent one that the respondent would have us declare it to be.

Now, in the present case, could Flynn, the respondent's husband, at the time he died, but for his death have maintained an action against the appellants for the damages resulting to him from the accident in question, under Art. 1053 C. C.; that is to say, after the expiration of one year from the time of the accident? I am of opinion that he could not.

By art. 1138, C. C., "All obligations become extinct by prescription;" and by art. 2183, "Prescription is a means of being discharged by lapse of time. Extinctive prescription is a bar to, and in some cases precludes, any action for the fulfilment of an obligation or the acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law." By art. 2262, actions for bodily injuries are prescribed by one year after the right of action accrued, and by art. 2267, after the lapse of one year the liability of the wrongdoer is absolutely extinguished, and no action lies for the damages resulting from his offence or quasi-offence; or, in other words, no action lies for bodily injuries, but during one year after the act of commission or omission by which they were caused, except in cases of continuous torts, *délits* or *quasi délits successifs*, the doctrine as to which has no application in the present case. By art. 2188 the courts are bound of their own motion to dismiss any action brought after the expiration of one year, if the limitation is not specially pleaded.

The respondent's contention that the only prescription that could have been opposed to an action by her husband at the time he died would have been that of two years, under art. 2261, is unfounded. That article, in express terms, covers only offences and quasi-offences where other provisions of the Code do not apply. Now, when art. 2262 decrees that actions for bodily injuries are prescribed by one year, it means *all* actions for bodily injuries under art. 1053, with, of course, the limitative words of the article itself, "saving the special provisions contained in art. 1056 and cases regulated by special laws." The respondent, to support this contention that the prescription of two years under art. 2261 would have been the only one applicable to an action by Flynn, has based an argument on the French version of art. 2262. The words "*injures corporelles*" therein, she sa'd, do not apply to a quasi-offence, but merely to an *offence*. There is no doubt that the word "*injures*" in this connection is generally taken to mean an "*injure par voie de fait*" or an offence, *délit*; yet Dareau, "*Des Injures*," 55, under the title "*Injures par action*," treats of the damages caused by negligence of a carriage driver, or by an unskillful surgical operation, and a case in our own Courts, *Wood v. McCallum*, 3 Rev. de Lég. 360, used the term "*an action d'injures*" for malicious arrest of a person. Another case of *Smith v. Binet*, Rev. de Lég., 504, says the contents of a confidential letter are not the subject of an *action d'injures*. Even in the Roman law, "*Quelquefois le mot injure signifie 'dommage,'*" says Thevenot Dessaulles, "*Dict. du Digeste*," vo. "*Injures*."

But however this may be, I do not attach any importance to it, because the Code itself gives an unmistakeable clue to the interpretation of the words as used in this article. When the English version says "*bodily injuries*," there is no room left for controversy. I take it that whether the article was first written in French or in English is immaterial, if there is no absolute contradiction between the two versions. In the case of ambiguity, where there is no possibility to reconcile the two, one must be interpreted by the other. The English version cannot be read out of the law; art. 2615, C. C. It was submitted to the Legislature, enacted and sanctioned simultaneously with the French one, and is law just as much as the French one is. Here the words "*bodily injuries*" leave no room for doubt, and we must conclude that "*injures corporelles*" mean bodily injuries, and that bodily injuries mean "*injures corporelles*." In fact, that

is what the two versions of the Code, read together or by the light of one another, say in express terms.

Moreover, in this article 2262 itself there is, intrinsically and without reference to the English version, a clear interpretation of the term "injuries corporelles" adverse to the respondent's contention on this point. The words therein, saving the special provisions contained in art. 1056, evidently and necessarily imply that the offences and quasi-offences mentioned in that art. 1056 are both such as can be the cause of bodily injuries or "injuries corporelles," for which art. 1053 gives an action, and which that article itself (2262) decrees shall be prescribed by one year. Were the respondent's views to prevail, it would follow that, as to offences, *délits*, causing death, under art. 1056, the prescription of one year of art. 2262 would be the one to apply, but that as to quasi-offences, *quasi-délits*, causing death under the same article 1056, the only prescription applicable would be that of two years under art. 2261. I do not see anything in these articles that would justify such a distinction. I hold, then, that the minority of the Court of Review rightly came to the conclusion that at the time of his death Flynn's right of action was gone. Now, it must be conceded that, had he lived and instituted an action against the Company at any time after the expiration of a year, his action must have been dismissed, even if the Company had not contested it at all, or if they had pleaded to the merits without invoking the prescription, by the Court itself of its own motion, as I remarked before (arts. 2188, 2267, C. C.), and this even in a court of appeal if it had escaped notice in the court of first instance. Such is the established jurisprudence of the province, and one which has received the direct sanction of this Court in the two cases of *Breakey v. Carter* and *Dorion v. Crowley*, Cass. Dig. 256, 420. In the recent case of *Corporation of Sherbrooke v. Dufort*, M. L. R., 5 Q. B. 266, the Court of Queen's Bench has anew given full application to this doctrine.

Now, as to that saving clause itself of art. 2262, "saving the special provisions contained in art. 1056," it is susceptible of only one construction—that is, that as to offences and quasi-offences followed by the death of the person injured thereby, the widow and other relatives herein named are given a year after the death to bring their action, though at the time of the bringing of their action more than a year had elapsed since the offence or quasi-offence which caused the death, *provided the deceased had not allowed his own action, given to him by art. 1053, to be extin-*

guished by prescription. This construction is the only possible one if, as I take it to be concluded by authority, it is an essential condition of the survivor's right of action that the deceased, at his death, himself had a right of action. In the present case, when Flynn died, the Company were freed from any liability for the consequences of their quasi-offence. It had been absolutely extinguished, and I do not see on what principle it could be contended that it was revived by his death in favour of his widow and child. That would be extending the right of the survivors under the Act to an unlimited number of years, and as long as the injured party survived his injury, with one year additional, provided doctors could be found to swear, and a jury to find, that the quasi-offence was the immediate cause of the death. Now, is that not against the very terms of art. 2267, which decrees that the liability of the wrongdoer is absolutely extinguished by effluxion of time, and of art. 2183, under which extinctive prescription precludes the action when it is not brought within the year? This saving clause of art. 2262 was undoubtedly inserted to obviate what would otherwise have evidently been a contradiction between the article itself and article 1056. Without it the widow would have had one year after the death to bring her action, only when the husband would have died on the very day of the accident, and if he died, say, ten months after the accident, she would have had only two months. With it she has one year after his death, if he dies at any time within the twelve months, and, perhaps, though unnecessary to decide here, if he dies after the twelve months, but the prescription as against him has been interrupted by an action or otherwise. It was not in the article as passed by the Legislature, and was inserted therein subsequently, as pre-existing law, by the Commissioners, as was art. 1056 itself. The Commissioners had not the power to make any amendments to the Code as passed by the Legislature, and therefore, in the construction of the two articles read together, as I previously remarked as to art. 1056, we are bound to declare, as nothing directly to the contrary appears therein, that the law is precisely the same as it was before the Code (except as for the time required for the prescription of actions for bodily injuries, which was specially enacted as new law), and consequently that under the Code, as it was previously under the Statute, any objection which would have been fatal to an action by the decedent, at the time when he died, must be fatal to an action by the survivors.

Now, as to the contention that the prescription should have been pleaded by the company. On this point also I think the respondent fails. The argument that her action is based on art. 1056 and that, consequently, prescription should have been pleaded as art. 2262 and art. 2267 do not apply to the said art. 1056, is based on the confusion of the matters in controversy. The basis of her action is art. 1053, not art. 1056, and the appellants do not at all contend that her action is prescribed. But they say that as Flynn's action, given to him by art. 1053, was, by art. 2262 prescribed when he died, and as by art. 2267 coupled with art. 2183 their liability was absolutely extinguished and he had then in law no right of action, consequently as art. 1056 only extends to her the right of the action he had when he died, she, in law, has no action. The maxim *contra non valentem agere nulla currit prescriptio* cited by the respondent has no application whatever. It is not a new fact, but one resulting from the respondent's own declaration upon which the appellants rely in support of their motion; and they simply contend that, upon the findings of the jury, assuming their absolute correctness, she has no claim against them. Troplong, Prescript. No. 87. They have pleaded a general denegation, besides a plea, in an exception, that they were not indebted towards the respondent in any sum of money whatever. That was, as unequivocally as could be, putting the respondent's right of action in issue. It has been argued that had the appellants specially pleaded that the action had been prescribed before Flynn's death, the respondents might in reply have alleged facts to show that the prescription had been interrupted or renounced to. But that is precisely the ground of one of the allegations of her declaration as follows:

"That since the occurrence of the said accident and since the death of the said Patrick Flynn, the said plaintiff acting for herself and her child had been in continuous communication with the said defendants, who have from time to time promised and agreed to compensate her for her great loss and damage, by reason of which the present action has been delayed, the said plaintiff believing in the good faith of the said defendants, but they have failed and neglected, notwithstanding, to comply with their undertaking, all of which the said plaintiff is ready and willing to establish."

Now, of that allegation not only has the respondent made no proof whatever and is there no finding by the jury, but she obviously abandoned it altogether by assenting to an assignment

of facts, in which there is not a word of it. Then apart from this, such a contention, assuming *Walker v. Sweet* (21 L. C. J. 29) to be correctly decided, if it were to prevail here, would put an end to the so-well established right of invoking these short prescriptions in *ex parte* actions, or without a special plea at any stage of the proceedings, and this even in appeal, for the first time. In every such case the plaintiff might also urge that had the prescription been pleaded he would have been able to reply and prove that it had been interrupted. And is it quite sure that a plaintiff would be allowed by a replication, such a departure from his original demand? Would not this be a new ground of action? If the plaintiff declares upon facts which in law do not show a right of action, he has no *locus standi*; and if he bases his demand on a right *prima facie* absolutely prescribed, and on which the law says he cannot maintain an action, but relies upon other facts to rebut the prescription, he must allege these other facts in his declaration, and if he alleges them but does not prove them, he must also fail, whether the prescription was pleaded or not. It seems to me here, upon this motion, that if by the respondent's declaration aside from the allegation of promise to pay which she has abandoned as I said, it appears that at his death her husband had no action, as I think it clear it does, the question is at an end. It was not necessary for the appellants to plead by *exception péremptoire* a point of law which arises from the respondent's own allegation of facts. Or to put the question in another shape, would not this action but for that allegation of promise to pay have been demurrable? Compare *Lavoie v. Grégoire*, 9 L. C. R. 255; *Filiatrault v. Grand Trunk*, 2 L. C. J. 97. If a debt extinguished by a peremptory prescription be transferred, could it be contended on an action by the transferee that prescription must be specially pleaded by the debtor? Unquestionably not, and the transferee plaintiff could not ask the court not to give effect to the prescription on the ground that had it been pleaded he might in reply have alleged interruption by the defendant in his dealings with the transferor. Now I think I am justified by the cases I have cited at the opening of my remarks to assimilate in this respect the action conferred on the survivors, by the statute, to an action by a transferee. By the statute construed as I think it must be, the wrongdoer has the same right to oppose to an action by the survivors, the grounds of defence that he would have had against an action by the deceased, that a debtor has to oppose to a transferee all the grounds of defence

he would have had against the transferor. That must be so, if it is law, as *Read v. Great Eastern* and *Griffiths v. The Earl of Dudley* held it to be, that no action lies under the statute if at the death there was not a subsisting cause of action.

By art. 431, C. P. C., the defendant has the right to move in arrest of judgment upon the verdict wherever it appears on the face of the record that, notwithstanding the verdict, the plaintiff has no right to recover any sum.

And by art. 433 the Court may, *non obstante veredicto*, render judgment in favour of the other party, if the allegations of the party to get the verdict are not sufficient in law to sustain his pretensions. These enactments, it seems to me, expressly recognise that it is not necessary for a defendant to plead questions of law which appear on the face of the record. There is no ambiguity in their terms, that I can see, and if they do not entitle the appellants here to the right to these motions, I am at a loss to understand what they mean.

As to the contention of the respondent that she is entitled to invoke the appellants' pleading and subsequent proceedings in the case as a waiver of their right in these motions, there is nothing in it. It is also evidently based on a misconception of the ground taken by the appellants, as if they were relying on prescription of the present action. Now I repeat it, that is not at all the ground they take. They simply deny that, upon the findings of the jury, she ever had a right of action. And I cannot conceive that their plea or other proceedings could give her a right to an action, which it appears on the face of the record they, *ab initio*, put in issue, and which she never had and never can have.

There is one point on which it is unnecessary to pass; yet which I must mention lest my silence might be construed as an acquiescence in the propositions of law that were enunciated thereon in the course of the argument. Both parties seem to have taken it for granted that the prescription of art. 2262 was not based on a presumption of payment, but only on grounds of public policy. I would have thought it based on both. However, as the question was not argued, I refer to it merely to remark, without coming to any determination whatever on the point, that all that the commissioners say about it in their report, could it affect the law, is, that it is grounded upon the higher region of public policy rather than on the presumption of payment. And it would seem to me that, in any liberating or extinctive

prescription, even those falling under art. 2267, the element of presumption of payment is not to be considered as entirely eliminated. Domat says, "Toutes ces sortes de prescriptions qui font perdre des droits sont fondées sur cette presumption que celui qui demeure si longtemps sans exiger sa dette en a été payé ou a reconnu qu'il ne lui était rien dû." I refer also to Pothier, *Oblig.*, 677, 718, 723, 727; Marcadé, *Prescr.*, page 233; Boileux, page 871; Troplong, *Prescript.* Nos. 943, 987, 994, 1003, 1035 and authorities in Sirey, codes annotés, under art. 2277 of the French Code, which is held by the commentators, and the jurisprudence, to be grounded, as our art. 2262 is, less on a presumption of payment than on reasons of public policy. Compare also *Fuchs v. Legaré*, *Caron v. Cloutier*, 3 Q. L. R. 11,230, and *Giard v. Giard*, 15 L. C. R. 494.

In the view I take of the case, it would be also unnecessary for me to refer to the evidence given at the trial. I will say a word however as to the contention argued at some length before us, on the part of the respondent, that the company had, by its conduct acknowledged its liability for this accident, and had thereby interrupted the prescription of Flynn's action, though in law it has no bearing on the case, as it is presented to us, and is even not now open to the respondent, as by the assignment of facts, no issue on this fact, by consent, was submitted to the jury. It is in evidence, it is true, that Dr. Girdwood did make some offers to the deceased on the part of the company, but he distinctly swears that these offers were merely made as a gratuity and to relieve his immediate wants, without acknowledging any obligation whatever. Mr. Armine Nicolls likewise testifies that offers made to him as acting for Flynn, by Mr. Drinkwater for the company, were made without any acknowledgment of liability. Under these circumstances the following cases are entirely applicable here :

"L'ouvrier opposerait vainement comme ayant eu pour effet d'interrompre la prescription, le fait de la réception de secours donnés par le patron, ces secours n'impliquant pas nécessairement que le patron ait entendu reconnaître la responsabilité qu'on prétend faire déclarer à sa charge.

"Qu'à supposer même que la compagnie ait donné quelques secours à Billebault, on ne saurait y voir une reconnaissance du droit de cet ouvrier, mais un acte de bienfaisance fort naturel, et que ce serait arrêter les louables élans de la charité que leur donner une portée qu'ils n'ont pas par eux-mêmes.

"Action en responsabilité dirigée devant un tribunal civil

“ contre un patron, à raison d'un accident survenu à l'un de ses ouvriers dans le cours de son travail.

“ En pareil cas la prescription n'est ni suspendue par la minorité de l'ouvrier, ni interrompue par un secours donné par le patron, accordé à titre de commisération et ne pouvant impliquer la reconnaissance d'une dette.” (Daloz, 1888-1-411).

I refer also to Daloz, 69-2-217, and 82-1, p. 254.

The formal judgment of the Court of Review, Wurtele, J., dissenting, is based upon the ground that the prescription of Flynn's right of action should have been pleaded, and that by their pleas, and subsequent proceedings in the cause, the appellants had waived their right to now invoke such prescription. By the formal judgment of the Court of Appeal, it does not appear that this judgment was confirmed upon other grounds; and I would have assumed that, when that Court merely says, “ Considering there is no error, doth affirm,” they had come to the same conclusion as the Court below upon the same grounds. In the printed case submitted to us there are unfortunately no notes from any of the learned Judges in the Court of Appeal. We have been referred, however, to what purports to be the opinion of the learned Chief Justice Dorion, speaking for the Court, in M. L. R., 6 Q. B. 118, by which it would appear that their *ratio decidendi*, taking a different ground from that of the first Court, was that the prescription against Flynn's action did not at all apply to the action of his wife and children, the Court thereby holding, if I do not misunderstand them, that assuming that the appellants were freed from all liability towards Flynn before his death, and even if they had specially pleaded the prescription of Flynn's action, yet that the respondent was entitled to her action.

I have come to the conclusion, after the best consideration I have been able to give to the case, for the reasons I have above given, that this judgment cannot be supported, and that the motion of the respondent for judgment on the verdict should be dismissed, and the motion of the appellants for judgment, in arrest of judgment, or *non obstante veredicto*, should be allowed.

At the settling of the minutes it will be determined after having heard the parties, if necessary, upon which of these motions judgment should be entered.

Appeal allowed with costs.

The Chief Justice, Sir W. J. Ritchie, and Gwynne and Patterson, JJ., concurred with Taschereau, J.

Strong, J., was also of opinion that the appeal should be allowed.

FOURNIER, J. (diss.)

Le présent appel est d'un jugement rendu à l'unanimité par la Cour du Banc de la Reine le 19 juin 1890, confirmant le jugement de la Cour de Révision siégeant à Montréal, lequel avait renvoyé les trois motions de l'appelante, 1o. pour jugement *non obstante veredicto*; 2o. en arrêt de jugement; et 3o. pour un nouveau procès, et avait accordé la motion de l'intimé pour jugement conformément au verdict rendu par le jury sur un second procès de cette cause.

L'action a été instituée le 17 mai 1884 par l'intimée, tant pour elle-même qu'en sa qualité de tutrice à son enfant mineur, pour recouvrer les dommages leur résultant de la mort de Patrick Flynn, mari de l'intimée et père de son enfant mineur. Cette mort avait été la suite d'un accident arrivé à Flynn par la faute et négligence de l'appelante. L'intimée concluait à \$10,000 de dommages et intérêts. L'appelante a plaidé que l'accident en question n'avait été causé par la faute et négligence de sa part, ni de la part d'aucun de ses employés, mais qu'au contraire il n'avait été causé que par la faute et négligence du dit Patrick Flynn. Sur la contestation ainsi liée, le procès eut lieu sous la présidence de l'Hon. Juge Doherty, et un verdict fut rendu en faveur de l'intimée pour \$2000, et \$1000 en faveur de son enfant mineur.

Jugement fut rendu par la majorité de la Cour de Révision, renvoyant la motion de l'intimée pour jugement et accordant la motion de l'appelante pour un nouveau procès. Sur appel à la Cour du Banc de la Reine, ce jugement fut renversé à l'unanimité des juges de cette cour par un jugement accordant à l'intimée le montant de son verdict.

Le jugement de la Cour du Banc de la Reine ayant été soumis à la révision de cette cour, il intervint le 20 juin 1887 en faveur de l'appelante un jugement lui accordant un nouveau procès, sur le principe que le juge avait erré en disant aux jurés: "qu'ils avaient le droit et pouvaient prendre en considération dans l'évaluation des dommages les angoisses et les peines d'esprit de la mère et de l'orpheline."

La cause étant revenue devant la Cour Supérieure pour faire fixer un jour pour le procès, l'appelante après plus de trois ans de contestation, fit motion pour amender son plaidoyer et obtint la permission de plaider de nouveau. Une nouvelle énonciation de faits fut préparée pour être soumise au jury. Le procès eut lieu le 28 et 29 novembre, et le jury rendit un verdict de \$4,500

en faveur de l'intimée et de \$2000 en faveur de son enfant mineur.

L'appelante fit alors à l'encontre de ce verdict les trois motions mentionnées plus haut. L'intimée de son côté fit motion pour jugement en sa faveur conformément au verdict.

Les deux premières motions, celle pour jugement *non obstante veredicto* et celle en arrêt de jugement, sont en réalité fondées sur les mêmes raisons, savoir que le droit d'intimée était éteint et prescrit dès avant l'institution de son action, parceque Patrick Flynn son mari ayant été victime de l'accident le 22 avril 1882, n'était mort que le 13 novembre 1883, plus d'un an et trois mois après, c'est-à-dire à une époque où l'action de Flynn, s'il eût vécu, eût été prescrite.

Cette prétention de l'appelante est toute nouvelle et est formulée pour la première fois sur le débat de ces motions. Il n'en a été fait aucune mention dans les défenses à l'action ni dans les plaidoiries orales. Les défenses ont été même amendées sans qu'on ait soulevé cette prétention. Les raisons invoquées au soutien de la motion pour un nouveau procès, étaient que la prépondérance de la preuve est en faveur de l'appelante, que Flynn ne fut pas blessé pendant qu'il était au service et sous les ordres de l'appelante, mais par sa propre faute et négligence; que le verdict est irrégulier et défectueux parceque les réponses sont vagues, incertaines et contradictoires, et que le montant accordé est excessif.

Devant la Cour de Révision on a fort savamment débattu la question de savoir laquelle des deux prescriptions, de celle d'un an en vertu de l'article 2262 ou de celle de deux ans en vertu de l'article 2261, doit s'appliquer au cas de quasi délit dont le mari de la demanderesse a été victime. Mais avant de rechercher la solution de cette question, il faudrait d'abord établir qu'il s'agit dans cette cause du droit d'action du mari. Tel n'est pas le cas, il n'est nullement question de la réclamation que le mari aurait eu s'il eut vécu, il s'agit uniquement de l'action donnée à l'intimée par l'article 1056, action qui ne peut exister qu'après la mort du mari, sans avoir reçu de compensation pour ses dommages.

L'action donnée à l'intimée dans les circonstances de cette cause est de date assez récente. Elle a d'abord été introduite par le Statut 10 & 11 Vic. Cap. 6, qui lui-même n'était pour ainsi dire que la copie du Statut impérial 9 & 10 Vic. Chap. 93, communément appelé le "Lord Campbell's Act." Ces dispositions législatives font maintenant partie du code civil dans lequel elles sont résumées sous l'article 1056. C'est dans cet article que l'on

doit trouver la source du droit d'action de l'intimée. Il lui est accordé de la manière suivante :—" 1056. " Dans tous les cas où " la partie contre qui le délit ou quasi-délit a été commis, décède " en conséquence sans avoir obtenu indemnité ou satisfaction, " son conjoint, ses père et mère et enfants, ont pendant l'année " seulement à compter du décès, droit de poursuivre celui qui en " est l'auteur ou ses représentants pour les dommages et intérêts " résultant de tel décès," etc.

L'action dont il s'agit n'est pas celle qu'aurait eue Flynn pour dommages lui résultant de ses blessures et des souffrances qu'il avait eues à supporter, c'est l'action spéciale accordée à sa veuve pour les dommages et intérêts lui résultant de la mort de son mari. Elle lui est accordée personnellement et non en aucune qualité de représentante de son mari. Elle ne réclame pas du chef de son mari, comme étant à ses droits, soit comme légataire ou autrement, l'indemnité qu'il aurait eu droit d'avoir. Non, elle exerce l'action qui lui est donnée par l'art. 1056, indépendamment de tous droits pouvant appartenir à son mari, elle ne derive son droit d'action que du Statut, c-a-d. du code, et nullement de son mari. Son action n'existe même pas du vivant de son mari, comment peut-on dire qu'elle dépend de l'existence du droit d'action de son mari et que s'il a laissé éteindre ou prescrire son droit autrement que par l'acceptation d'une indemnité, la perte de son droit entraîne aussi celui de sa femme, qui n'est pas son héritière ou représentante légale et qui ne réclame pas de son chef, mais qu'elle possède en vertu d'une disposition spéciale et personnelle en sa faveur ? Une telle prétention est si évidemment fausse qu'elle se refute d'elle-même. Ce droit d'action reconnu à la femme est un droit additionnel. Pourqu'il existe il faut d'abord que son mari n'ait pas accepté de compensation pour les conséquences du délit ou quasi-délit dont il a été victime. Ce n'est qu'après le décès de son mari que le droit de poursuivre celui qui en est l'auteur, pour les dommages-intérêts résultant de tel décès prend naissance par l'existence de la condition.

Son mari étant décédé le 13 novembre 1883 sans avoir accepté ni reçu aucune compensation pour ses dommages, ce n'est qu'à compter du moment de son décès, que le droit d'action de l'intimée a commencé à exister. Mais d'après l'étrange proposition de l'appelante, que le droit d'action du mari étant prescrit, celui de la femme doit également l'être et même avant d'avoir existé parce qu'au moment du décès de son mari, le droit de ce dernier

était déjà prescrit. que fait-on de la disposition qui accorde à la femme son droit d'action pendant *l'année seulement* à compter du décès? On l'ignore tout simplement, ou mieux encore on a recours à une subtilité aussi ingénieuse que peu honnête, pour déterminer son droit d'action en prétendant qu'il n'était que le même droit que celui de son mari, ayant pour origine le même quasi-délit, et que le mari ayant laissé prescrire son action, celle de la femme l'a été également.

D'abord, il n'est pas vrai que l'action du mari soit la même que celle de la femme. Elles ne naissent pas en même temps et la nature en est différente. Celle du mari prend naissance immédiatement après l'accident, et tant qu'elle existe, la femme n'a elle-même aucun droit d'action. L'action du mari a pour objet de réclamer ses dommages lui résultant de ses blessures, perte de temps, et celle de la femme est limitée aux dommages-intérêts résultant du décès du mari.

Comment peut-on appliquer la même prescription, que ce soit celle d'un an ou de deux ans, et les faire courir de la date de l'accident contre les actions respectives du mari et de la femme? Si c'est celle d'un an, dans le cas actuel le mari étant mort plus de 15 mois après l'accident l'action de la femme était prescrite avant la naissance de son droit d'action que la loi ne lui accorde qu'à compter du décès. C'est détruire en entier l'effet de l'article. La vraie date de la prescription de l'action de la femme est si clairement et si positivement déterminée par le Code qu'il paraît absurde de chercher à en établir une autre. C'est, dit l'article 1056, *pendant l'année seulement à compter du décès* que la femme aura droit de poursuivre l'auteur du délit ou quasi-délit pour les dommages-intérêts résultant de tel décès. Tant qu'il n'est pas écoulé un an depuis le décès du mari, la femme a droit d'exercer son action comme dans le cas actuel, et il est tout-à-fait indifférent pour ce qui la regarde, que la prescription soit d'un an ou de deux ans, quant à l'action qu'aurait eu son mari. Son action à elle qui naît au décès de son mari ne peut pas durer plus d'un an et n'est nullement liée au sort du droit d'action de son mari. Les tribunaux n'ont pas le droit d'étendre ni de diminuer la durée de son action, elle a droit de l'exercer pendant toute l'année après le décès de son mari.

Puisque tant que son mari n'est pas mort, la femme ne peut exercer aucun droit d'action, son action ne peut donc être prescrite, conformément à la maxime *contra non valentem agere nulla currit prescriptio*. Cette action de la femme me paraît assez solidement

appuyée sur l'article 1056 pour qu'il ne soit pas nécessaire de discuter la question de savoir si ce n'est pas plutôt la prescription de deux ans de l'art. 2261 que l'on doit appliquer au cas actuel. En effet l'accident dont il s'agit n'est qu'un pur quasi-délit dans lequel l'élément de la malice n'entre nullement.

L'hon. juge en chef, Sir A. A. Dorion, après avoir exprimé que la prescription de l'action du mari dans le cas actuel ne devrait courir qu'après l'expiration des quinze mois pendant lesquels il a survécu à l'accident, s'exprime ainsi dans son jugement sur cette cause au sujet de la prescription de l'action de la femme : "This is not an action by the injured person, but a different action. The Civil Code, Art. 1056, gives to the widow and children of one who dies from injuries received from the negligence of another an action against the guilty party. This action is not given to them in any representative quality, and the article expressly provides that it may be brought within a year from the decease of the injured party. The prescription against the action of the deceased did not therefore apply to the action of the wife and children. This was the opinion of the majority of the Court of Review, and it will be unanimously affirmed by this Court." M. L. R., 6 Q. B. 124.

Pour ces raisons je suis d'avis que le jugement de la Cour du Banc de la Reine devrait être affirmé avec dépens.

Judgment reversed, Fournier, J., dissenting.

An application was made on the 25th July, 1891, to the Judicial Committee of the Privy Council, for special leave to appeal from the above judgment.

After a full statement by counsel, the Committee granted the application.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Petition of Robinson for special leave to appeal in the matter of a cause intituled Robinson v. the Canadian Pacific Railway, from the Supreme Court of Canada; delivered July 25th, 1891.

Present :

LORD WATSON.

LORD HANNEN.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[Delivered by Lord Watson.]

Having regard to the general importance of the question raised in this Petition upon sections 1056 and 2262 of the Civil Code of Lower Canada, and also to the difference of judicial opinion in the Courts below, their Lordships think it right to advise Her Majesty to admit the Appeal. But they desire to intimate that in order that the only point which they think of sufficient importance to warrant an Appeal may be fully discussed, they will not expect the Appellant to raise any question as to the propriety of the plea being added to the record. They also desire to intimate that in the event of the Board coming to a different conclusion from the Supreme Court on the construction of the Code, they will not be disposed to entertain any question as to the propriety of granting a new trial, a point which might, in that case, be open to the respondent. That is a matter which, should it arise, must be remitted to the Court below. These hints may enable the parties to diminish the bulk of the record.

Petition granted.

Kenelm E. Digby for petitioner.

H. Abbott, Q.C., contra.

COUR SUPERIEURE.

(EN CHAMBRE.)

Coram TASCHEREAU, J.

MONTREAL, 15 février 1892.

EMILIE BEAULNE v. VICTOR FORTIER et al.

Action pour pension alimentaire—Demande à ester en justice in formâ pauperis.

TASCHEREAU, J.:—Il s'agit d'une requête de la dite Emilie Beaulne demandant à ester en justice *in formâ pauperis* dans une action qu'elle veut intenter en Cour Supérieure pour pension alimentaire.

Il paraît s'être glissé dans ce district une pratique tout-à-fait vicieuse sous ce rapport. Elle consiste à instituer invariablement ces sortes d'actions devant la Cour Supérieure, lorsqu'il est si facile, en réclamant seulement trois mois ou six mois d'une pension alimentaire, de les intenter en Cour de Circuit, et par là d'éviter aux parties, le plus souvent très-pauvres, des frais considérables. Un défendeur condamné en Cour de Circuit à payer une pension alimentaire à ses parents âgés et infirmes, n'est généralement pas disposé à recommencer un nouveau procès. Il règle

finalemeut cette question, et le premier jugement aura toujours, sinon l'effet légal, du moins l'effet pratique de la chose jugée. Cela d'ailleurs n'empêche pas l'évocation, par l'une ou l'autre des parties, dans les causes qui en vaudraient la peine.

Autrefois, ces sortes d'actions se portaient toujours à la Cour de Circuit. Il est à désirer qu'on en revienne à cette sage coutume.

J'ai consulté mes collègues à cet égard et nous nous sommes entendus pour refuser dorénavant la permission d'ester en justice *in forma pauperis* à la Cour Supérieure dans ces causes.

(La requérante retire sa requête et en présente une autre pour ester en justice *in forma pauperis* à la Cour de Circuit, laquelle est accordée.)

J. A. Lefebvre, pour la requérante.

J. A. David, pour les défendeurs.

COURT OF QUEEN'S BENCH—MONTREAL.

Pleading—Demurrer—Sufficiency of allegations—Compound interest.

Held:—Where the plaintiff claimed a certain capital sum, and also computed compound interest as well as interest thereon, and alleged as to the total amount, "which said last mentioned sum "the said defendant hath often admitted to owe and promised to "pay to the said plaintiff, but has always neglected to do so,"—that the allegations of the declaration justified a conclusion for the whole amount; and that it was not necessary to allege specially that the defendant had promised to pay compound interest.—*Mc Vey & Mc Vey*, Lacoste, C.J., Bossé, Blanchet, Wurtele, Tait, JJ., Nov. 27, 1891.

Insurance, Guarantee—Conditions of Policy—Interpretation.

By a condition of the policy it was provided that the company should make good to the employer such pecuniary loss as might be sustained by him by reason of the dishonesty of the employee "committed and discovered during the continuance of this agreement, and within three months from the death, dismissal, or retirement of the employee." The policy lapsed, and a defalcation was discovered four months afterwards.

Held:—(By the Superior Court,) That the company was not liable in respect of such defalcation, inasmuch as it was not discovered as well as committed during the continuance of the agreement.

The policy also contained a clause that on the discovery of any fraud or dishonesty on the part of the employee, the employer should immediately give notice to the company. A defalcation was discovered April 6, and the company was not notified until April 17, when the employee had left the country.

Held:—(By the Court of Queen's Bench), That the employer was not entitled to recover under the policy.—*Commercial Mutual Building Society & London Guarantee & Accident Co.*, Baby, Bossé, Doherty, Cimon, JJ., June 25, 1891.

SUPERIOR COURT—MONTREAL.

Promissory note—Illegal consideration—Speculative transactions—Gaming Contract—Art. 1927, C. C.

Held:—That there is no right of action for the recovery of the amount of a promissory note given by the proprietor of what is commonly termed a "bucket-shop," to a customer, in settlement of speculative transactions between them, i.e., speculations on the rise and fall of prices of goods and stocks, without delivery of the things bought and sold.—*Dalglish v. Bond*, Loranger, J., Feb. 19, 1889.

PROCEEDINGS IN APPEAL—MONTREAL.

Wednesday, February 17.

Cadieux & Taché.—Heard on appeal from judgment of Superior Court, Montreal, Davidson, J., April 26, 1890.—C.A.V.

C. P. R. Co. & Collins; C. P. R. Co. & Larmouth.—Heard on appeal from judgments of Superior Court, Montreal, Wurtele, J., March 13, 1890.—C.A.V.

Thursday, February 18.

Lamarche & Brunelle.—Leave to appeal from interlocutory judgment granted.

Desrocy & Morin; Corporation of Parish of St. Ours & Morin.—Heard on appeal from judgments of Superior Court, district of Richelieu, Ouimet, J., June 13, 1887.—C.A.V.

Carter & McCaffrey.—Heard on appeal from judgment of Superior Court, district of Bedford, Lynch, J., May 19, 1890.—C.A.V.

Friday, February 19.

Fortier & Tellier, & Dorion.—Petition for *habeas corpus*.—C.A.V.

Stewart & St. Ann's Mutual Building Society.—Heard on appeal from judgment of Superior Court, Montreal, Jetté, J., Sept. 18, 1888.—C.A.V.

Ex parte Litzenberg alias Morgan.—Writ of *habeas corpus* ordered to issue.

Lefebvre & Magnan, & Marsan dit Lapierre.—Part heard on appeal from judgment of Superior Court, Montreal, Taschereau, J., Sept. 14, 1889.

Saturday, February 20.

Bernier & Tremblay.—Quebec case. Judgment reversed, and writ of prohibition quashed.

Lambe & Muth.—Motion for leave to appeal rejected.

Lefebvre & Magnan.—Hearing concluded.—C.A.V.

Monday, February 22.

Ex parte Litzenberg alias Morgan.—*Habeas corpus* under Extradition Act. Heard.—C.A.V.

Canadian Bank of Commerce & Stevenson.—Third hearing.—C.A.V.

Tuesday, February 23.

Delvecchio & Lapierre.—Motion to unite four appeals granted.

Vipond & Tiffin.—Heard on appeal from judgment of Superior Court, Montreal, Davidson, J., March 31, 1890.—C.A.V.

Ex parte Litzenberg alias Morgan.—Petition for *habeas corpus* under Extradition Act rejected.

Shaw & Norman.—Heard on appeal from interlocutory judgment of Superior Court, Montreal, Oct. 8, 1890.—C.A.V.

Tellier & Fortier.—Petition for *habeas corpus* rejected.

Brown & Leclerc.—Heard on appeal from judgment of Superior Court, Montreal, Loranger, J., March 11, 1890.—C.A.V.

Wednesday, February 24.

Lapierre & Rodier.—Reversed, Wurtelle, J., dissenting.

Powers & Martindale.—Reversed.

Canada Atlantic Railway Co. & Poirier.—Confirmed.

Cité de Sorel & Provost.—Reversed, and action dismissed.

Gillard & Moore.—Motion for leave to appeal rejected.

Ville de Longueuil & Prefontaine.—Heard on appeal from judgment of Superior Court, Montreal, Davidson, J., March 5, 1890.—C.A.V.

Prieur & Aubert de Gaspé.—Heard on appeal from judgment of Superior Court, Montreal, Tait, J., September 18, 1890.—C.A.V.

The Court adjourned to March 15.

INSOLVENT NOTICES.

Quebec Official Gazette, Feb. 6, 13, 20.

Judicial Abandonments.

- ARMSTRONG, Archibald, Melbourne, Jan. 30.
BESSETTE, Jérémie (Mad. A. Bessette), Montreal, Feb. 13.
BILODEAU, Jean, St. Elzéar, and J. Bilodeau & fils, Ste. Marie, Feb. 3.
BISSON, H. & J., Lévis, Feb. 6.
BROUSSEAU, Miles, R., St. Paul d'Abbotsford, Feb. 8.
DESPAROIS, Paul Ephrem, Salaberry de Valleyfield, Feb. 6.
GAUDETTE & Co. (Dame Marie Gladiu *et vir*), Farnham, Jan. 25.
GODBOUT, Frs. Xavier, St. Joseph de Lévis, Feb. 3.
HUA, Richardson & Co., tanners and leather merchants, Montreal, Jan. 30.
MERCIER, Joseph, Montreal, Feb. 4.
MORIN & Cie., Dr. Ed., Quebec, Feb. 16.
NAULT, François Xavier, St. Casimir, Feb. 18.
PROVOST, Hubert, contractor, Maisonneuve, Feb. 12.
POUPART & De Rouselle, Montreal, Feb. 6.
ST. LAURENT, Alfred, auctioneer, Quebec, Feb. 4.
TROTTIER, Felix, trader and manufacturer, St. Casimir, Jan. 28.
TRUDEAU, Aimé, Windsor Mills, Feb. 8.

Curators appointed.

- ARMSTRONG, Archibald.—Millier & Griffith, Sherbrooke, joint curator, Feb. 16.
BECK, Martin, Montreal.—D. Williamson, Montreal, curator, Feb. 8.
BUSH & Co., Chas. F., Montreal.—D. Seath, Montreal, curator, Feb. 8.
CARDINAL, Félix, St. Stanislas.—Kent & Turcotte, Montreal, joint curator, Feb. 2.
CARDINAL & Co.—Bilodeau & Renaud, Montreal, joint curator, Feb. 6.
CARROLL & Co., Montreal.—J. McD. Hains, Montreal, curator, Feb. 17.
CHOINIERE, Louis, St. Pie.—J. Morin, St. Hyacinthe, curator, Feb. 6.
DAOUST, F. X., furrier, Montreal.—C. Desmarteau, Montreal, curator, Feb. 4.
DEMERS, J. B., tanner, Ste. Julie.—N. Matte, Quebec, curator, Feb. 6.

- DESPAROIS, Paul E., Valleyfield.—Kent & Turcotte, Montreal, joint curator, Feb. 15.
- DUBOIS, Louis, St. John's.—D. Seath, Montreal, curator, Feb. 1.
- FALARDEAU & Paquet, tanners, Quebec.—N. Matte, Quebec, curator, Feb. 1.
- GALIBOIS, F. X.—L. A. Bergevin, Quebec, curator, Feb. 12.
- GAUDETTE & Co.—E. Donahue, Farnham, curator, Feb. 2.
- GOUBOUT, Frs. X.—P. J. G. Labbé, Quebec, curator, Feb. 16.
- GOUBDEAU, Félix.—D. Arcand, Quebec, curator, Feb. 9.
- GREYNALD, R. B., distiller, Berthierville.—C. Desmarteau, Montreal, curator, Jan. 30.
- HOOD, Mann & Co., Montreal.—W. A. Caldwell, Montreal, curator, Feb. 6.
- HUA, Richardson & Co., Montreal.—W. A. Caldwell, Montreal, curator, Feb. 20.
- LANGIE, Philomène, widow of late Auray Laferrière.—J. O. Dion, St. Hyacinthe, curator, Feb. 2.
- LESSARD, F. X., Montreal.—D. Seath, Montreal, curator, Jan. 23.
- LOUGHMAN & O'Flaherty, Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 8.
- MALBOEUF, C. A. L., Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 3.
- MARROTTE, Samuel, Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 16.
- MERCIER, Joseph.—J. M. Marcotte, Montreal, curator, Feb. 10.
- PRICE, John, Montreal.—J. McD. Hains, Montreal, curator, Jan. 29.
- RENÉ, J. H., Nicolet.—F. Valentine, Three Rivers, curator, Feb. 13.
- ROBERGE, Edouard.—Millier & Griffith, Sherbrooke, joint curator, Feb. 10.
- ROLLAND, P. L.—Bilodeau & Renaud, Montreal, joint curator, Jan. 30.
- SENNEVILLE, Hylas, Nicolet.—F. Valentine, Three Rivers, curator, Feb. 13.
- ST. LAURENT, F. A.—G. H. Burroughs, Quebec, curator.
- THIBAUDEAU, Honoré, Stanfold.—H. A. Bedard, Quebec, curator, Feb. 8.
- TROTTIER, Félix.—G. H. Burroughs, Quebec, curator, Feb. 9.
- WILKINS, Charles, Barnston.—G. B. Hall, Barnston, curator, Feb. 3.

THE LEGAL NEWS.

VOL. XV.

APRIL 1, 1892.

No. 7.

The Judicial Committee of the Privy Council, in the recent case of *Huntingdon v. Attrill*, 8 Times Law Reports, 841, paid the United States Supreme Court the compliment of adopting a definition enunciated by the latter tribunal. The question having arisen as to the proper test of whether or not an action is "penal" within the meaning of the well-known rule of private international law which prohibits one State from enforcing the penal law of another, their lordships adopted "without hesitation" that prescribed by Mr. Justice Gray in *Wisconsin v. Pelican Insurance Company* (127 U.S. 20 Davis, at p. 265): "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

Mr. Kenelm E. Digby, who has appeared before the Judicial Committee of the Privy Council in numerous Canadian cases, including the *cause célèbre* respecting taxes on commercial corporations, has been appointed by the Lord Chancellor to be judge of the County Courts for Derbyshire. The *London Law Journal* says:—"No

better appointment to a County Court judgeship could have been made than that of Mr. Kenelm E. Digby. In the prime of life, a sound lawyer, and a sufficiently experienced practitioner, he will soon command the respect of the Derbyshire County Courts."

THE NEW TARIFF OF FEES.

A correspondent writes as follows:—

"I enclose you a copy of the judgment in the case of *Quebec Bank & Bryant, Powis & Bryant, & Walker*, opponent, to which it would be well to call attention in the *Legal News*. The point is one of interest to the bar, as it is entirely different from the holding in this district (Montreal) relative to the application of the new tariff of advocates' fees."

The opinion referred to was delivered by Mr. Justice Routhier, in the Court of Review, Quebec, and reads as follows:—

ROUTHIER, J. Cette cause a été inscrite en Révision le 8 juillet 1891. La demanderesse, intimée, a comparu le 1 septembre, et a produit son factum le — septembre 1891. La cause a été entendue et jugée depuis.

Il s'agit maintenant de savoir si le mémoire de frais des avocats de l'intimée doit être taxé suivant l'ancien tarif, ou conformément au tarif actuel qui est entré en vigueur le 1 septembre dernier.

La question ne nous paraît pas douteuse. Le tarif est une loi, et cette loi est entrée en vigueur le 1er septembre; elle doit être appliquée à toutes les procédures faites ce jour-là et depuis.

"Mais," dit-on, "cette cause était commencée antérieurement."

Cette objection peut affecter les articles du tarif qui fixent les honoraires des avocats pour tous leurs services dans une cause, suivant l'étage auquel cette cause en est rendue, c-à-d. les dix premiers articles du tarif de la Cour Supérieure; mais elle n'affecte pas les articles, fixant des honoraires spéciaux pour certaines procédures spéciales.

Lorsqu'un avocat se charge d'une cause il ne saurait prévoir toutes les procédures qu'il aura à faire pour conduire cette cause à jugement, ni pendant combien de temps cette cause sera pendante, ni à quelles dates il devra faire telles et telles procédures dans l'intérêt de son client; et dès lors il ne saurait déter-

miner d'une manière certaine quel sera le montant que lui devra son client lorsque la cause sera finie.

Dans le mandat qui intervient alors entre eux le prix des services de l'avocat reste à déterminer plus tard, et il dépendra des procédures qu'il devra faire et du tarif alors applicable à ces procédures. D'une part l'avocat s'oblige à faire toutes les procédures que l'intérêt de son client exigera, et d'autre part, celui-ci promet payer à son avocat les honoraires alors fixés par le tarif pour ces procédures.

Il nous semble donc évident que toutes les procédures auxquelles sont attachés des honoraires spéciaux, et qui ont été faites depuis la mise en force du nouveau tarif, doivent en bénéficier, lors même que la cause dans laquelle elles sont faites aurait été commencée longtemps auparavant; ce n'est pas donner à la loi un effet rétroactif.

Mais que faut-il décider relativement aux dix premiers articles du tarif dans les causes commencées avant le 1er septembre et terminées depuis?

Nous croyons que la même règle doit s'appliquer, c-a-d. que le prix des services doit être fixé suivant le tarif en force à l'époque où les services ont été rendus. Dès lors nous accorderons à l'avocat les honoraires fixés par le nouveau tarif, mais nous en déduirons la différence entre les deux tarifs à l'étage auquel la cause était rendue au 1er septembre dernier. Ainsi par exemple supposons une action de la première classe dans laquelle l'issue était jointe mais qui n'était pas inscrite au 1er septembre, et qui a été jugée depuis, au mérite, après audition finale. Nous accorderons dans ce cas à l'avocat du demandeur \$80, moins la différence entre l'item 8 du nouveau tarif et l'item — de l'ancien tarif, soit \$ —.

Telle est la jurisprudence établie à Québec sur cette question.

Casgrain, Angers & Lavery, attorneys for plaintiff.

Chapleau, Hall, Brown & Sharp, attorneys for defendant.

Charles Fitzpatrick, counsel.

SUPREME COURT OF CANADA.

OTTAWA, Nov. 17, 1891.

Quebec.]

BENNING et al. v. THIBAUDEAU ES QUAL.

Insolvency—Claim against insolvent—Notes held as collateral security—Collocation—Joint and several liability.

Held, affirming the judgment of the Court below, M.L.R., 5 Q. B. 425, that a creditor who, by way of security for his debt,

holds a portion of the assets of his debtor, consisting of certain goods and promissory notes endorsed over to him, is not entitled, until fully paid, to be collocated upon the estate of such debtor in liquidation under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sums of money he may have received from other parties liable upon such notes or which he may have realized upon the goods, provided it is before the day appointed for the distribution of the assets of the estate on which the claim is made.

Fournier, J., dissenting on the ground that the notes having been endorsed over to the creditor, as additional security, all the parties thereto became jointly and severally liable, and that under the common law the creditor of joint and several debtors is entitled to rank on the estate of each of the co-debtors for the full amount of his claim until he has been paid in full, without being obliged to deduct therefrom any sum from the estates of the co-debtors jointly and severally liable therefor.

Gwynne, J., dissenting on the ground that there being no insolvency law in force, the respondent was bound upon the construction of the agreement between the parties, viz., the voluntary assignment of Feb. 1882, to collocate the appellants upon the whole of their claim as secured by the deed.

Appeal dismissed with costs.

Beique, Q.C., for appellant.

Geoffrion, Q.C., for respondent.

Quebec.]

OTTAWA, Nov. 17, 1891.

ONTARIO BANK V. CHAPLIN.

Joint and several debtors—Insolvency—Distribution of assets—Privilege—Winding up Act, sec. 62—Deposit with Bank after suspension.

Held:—1st. Affirming the judgment of the Court below, M.L.R., 5 Q.B. 407, Strong and Fournier, JJ., dissenting, *Per* Ritchie, C.J., and Taschereau, J., that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt; but is obliged to deduct from his claim the amount previously received from the estates of other parties jointly and severally liable therefor.

Per Gwynne and Patterson, JJ. That a person who has realised a portion of his debt upon the insolvent estate of one of his

co-debtors, cannot be allowed to rank upon the estate in liquidation under the Winding up Act of his other co-debtor jointly and severally liable, without first deducting the amount he has previously received from the other estate. R.S.C., ch. 129, sec. 62. The Winding up Act.

2. (Affirming the judgment of the Court below), a person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

Appeal dismissed with costs.

H. Abbott, Q.C., for appellant.

Greenshields, Q.C., for respondent.

Quebec.]

OTTAWA, Feb. 16, 1892.

BELLECHASSE ELECTION CASE.

G. AMYOT V. LABRECQUE.

Dominion Controverted Elections—Election Petition—Status of petitioner—Onus probandi.

The election petition was served upon the appellant on the 12th of May, 1891, and on the 16th of May the appellant filed preliminary objections, the first objection being as to the status of petitioners. When the parties were heard upon the merits of the preliminary objections, no evidence was given as to the status of the petitioners and the Court dismissed the preliminary objections. On appeal to the Supreme Court it was

Held, reversing the judgment of the Court below and following the decision of this Court in the *Stanstead election*, (*ante*, p. 8) that the onus was on the petitioner to prove his status as a voter (Gwynne, J., dissenting).

Appeal allowed and petition dismissed.

Amyot for appellant.

Belleau, Q.C., for respondent.

Quebec.]

OTTAWA, Feb. 16, 1892.

ARGENTEUIL ELECTION CASE.

CHRISTIE V. MORRISON.

Dominion Controverted Elections—Election petition—Preliminary objections—Deposit of security—R.S.C., ch. 9 sec. 9(f).

The preliminary objection in the case was that the security and

deposit receipt was illegal, null and void, the written receipt signed by the prothonotary of the Court being as follows: "that the security required by law has been given on behalf of the petitioners by a sum of \$1000, in a Dominion note, to wit, a note of \$1000 (Dominion of Canada) bearing the number 2914, deposited in our hands by the said petitioners, constituting a legal tender under the statute now in force." The deposit was in fact a Dominion note of \$1000.

Held, affirming the judgment of the Court below, that the deposit and receipt complied sufficiently with section 9 (f) of the Dominion Controverted Elections Act.

Appeal dismissed with costs.

Code for appellant.

H. Abbott, Q.C., for respondent.

Quebec.]

OTTAWA, Feb. 16, 1892.

LAPRAIRIE ELECTION CASE.

GIBEAULT V. PELLETIER.

Dominion Controverted Elections—Election Petition—Preliminary examination of respondent—Order to postpone until after session—Effect of—Six months' limit—R.S.C., ch. 9, secs. 19 and 32.

On the 23rd April, 1891, after the petition in this case was at issue, the petitioner moved to have the respondent examined prior to the trial, so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that being attorney in his own case, it would not "be possible for him to appear, answer the interrogatories, and to attend to the case in which his presence was necessary, before the closing of the Session." This motion was supported by an affidavit of the respondent, stating that it would be "absolutely necessary for him to be constantly in Court to attend to the present election petition," that it was not possible "for him to attend to the present case, for which his presence is necessary, before the closing of the Session," and the Court ordered the respondent not to appear until after the Session of Parliament. Immediately after the Session was over an application was made to fix a day for the trial, and it was fixed for the 10th of December, 1891, and the respondent was examined in the interval. On the 10th of December the respondent objected to the jurisdiction of the Court on the ground that the trial had

not commenced within six months following the filing of the petition, and the objection was maintained.

Held, reversing the judgment of the Court below, that as it appeared by the proceedings in the case and the affidavit of the respondent, that the respondent's presence at the trial was necessary, in the computation of time for the commencement of the trial, the time occupied by the Session of Parliament should not be included, R.S.C. ch. 9, sec. 32.

Appeal allowed with costs.

Choquette for appellant.

Lajoie for respondent.

Quebec.]

OTTAWA, Feb. 18, 1892.

PRESCOTT ELECTION CASE.

PROULX V. FRASER.

Dominion Controverted Elections — Election petition — Status of petitioner — When to be determined — R.S.C., ch. 9, secs. 12 & 13.

In this case the respondent by preliminary objection objected to the status of the petitioner, and the case being at issue, copies of the voter's lists for the electoral district were filed, but no other evidence was offered, and the Court set aside the preliminary objection without prejudice to the right of the respondent if so advised to raise the same objection at the trial of the petition. No appeal was taken from this decision, and the case went on to trial, when the objection was renewed, but the Court overruled the objection, holding they had no right to entertain it, and on the merits allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court on the ground that the onus was on the respondent to prove the status, and that the status had not been proved.

Held, affirming the judgment of the Court below, that the objection raising the question of the qualification of the petitioner must be raised by preliminary objection and disposed of in a summary manner, and if the decision of the Court thereon is not appealed from, the Court will not entertain such preliminary objection at the trial. R.S.C. ch. 9, secs. 12 & 13.

Appeal dismissed with costs.

Belcourt for appellant.

Ferguson, Q.C., for respondent.

Quebec.]

OTTAWA, March 9, 1892.

DOMINION SALVAGE AND WRECKING COMPANY V. BROWN.

Action for call of \$1,000—Future rights—R.S.C. sec. 29, subsec. (b) of the Supreme and Exchequer Courts Act.

The company sued the defendant B. for \$1000, being a call of ten per cent on 100 shares of \$100 each alleged to have been subscribed by B. in the capital stock of the Company, and prayed that the defendant be condemned to pay the said sum of \$1000 with costs. The defendant denied any liability, and alleged that he was not a shareholder, and the Company's action was dismissed.

On appeal to the Supreme Court of Canada by the Company,

Held, that the appeal would not lie, the amount being under \$2,000, and there being no such future rights as specified in subsec. (b) of sec. 29, which might be bound by the judgment. *Gilbert & Gilman*, 16 Can. S. C. R. 189.

Appeal quashed without costs.

Goldstein for appellant.

Blake, Q.C., for respondent.

Manitoba]

OTTAWA, Nov. 17, 1891.

WHELAN V. RYAN.

Assessment and Taxes—Irregular assessment—By-law—Validating Acts—Effect of—Crown lands.

In 1879 lands were purchased from the Dominion Government but patent did not issue until April, 1881. The patentee conveyed the lands which in May, 1882, were mortgaged to R. In 1880 and 1881 the lands were taxed by the municipality in which they were situate, and the taxes not having been paid, they were, in March, 1882, sold for unpaid taxes. The purchaser at the tax sale received a deed in March, 1883, and by conveyances from him the lands were transferred to W, who applied for a certificate of title thereto. R. filed a caveat against the granting of such certificate.

By the Statutes under which the lands are taxed the Municipal Council must, after the final revision of the assessment roll in every year, pass a by-law for levying a rate on all real and personal property assessed by said roll. No such by-law was passed in either of the years 1880 or 1881.

45 Vict. c. 16, s. 7, makes all deeds executed in pursuance of a sale for taxes valid, notwithstanding any informality in or preceding the sale, unless questioned within one year from the date of their execution, and 51 Vict. c. 101, s. 58, provides that "all assessments made and rates heretofore struck by the municipalities are hereby confirmed, and declared valid and binding upon all persons and corporations affected thereby."

Held, affirming the decision of the Court of Queen's Bench (6 Man. L. R. 565) Patterson J. dissenting, that the assessments for the years 1880 and 1881 were illegal for want of a by-law, and the sale made for unpaid taxes thereunder was void.

Held, per Strong and Gwynne, JJ., Patterson, J., *contra*, 1. The Acts 45 Vict. c. 16, sec. 7, and 51 Vict. c. 101, s. 58, only cure irregularities, but will not make good a deed that was absolutely void as in this case.

2. That until the patent was issued by the Dominion Government, these lands were exempt from taxation. The patent did not issue until April, 1881. Hence the taxes for which the lands were sold accrued due while they were vested in the Crown.

Held, per Strong, J., following *McKay v. Chrysler* (3 Can. S. C. R. 436) and *O'Brien v. Cogswell* (17 Can. S. C. R. 420), that the defects cured by 45 Vict. c. 16, s. 7, are only irregularities in the proceedings connected with the sale, as distinguished from informalities in the assessment and levying of the taxes.

Appeal dismissed with costs.

S. H. Blake, Q.C., for the appellant.

Gormully, Q. C., for the respondent.

Manitoba.]

OTTAWA, Nov. 17, 1891.

STEPHENS v. MCARTHUR.

Construction of Statute—Transfer of personal property—Preference by—Pressure—Intent.

By the Manitoba Act, 49 Vict. s. 45, s. 3, "every gift, conveyance etc, of goods, chattels or effects made by a person at a time when he is in insolvent circumstances with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void."

Held, reversing the judgment of the Court of Queen's Bench

(6 Man. L. R. 496) Patterson, J., dissenting, that the meaning of the word "preference" in this act is that which has always been given to the expression when used in bankruptcy and insolvency statutes; it imports a voluntary preference, and does not apply to a case where the transfer has been induced by the pressure of the creditor.

Held, further, that a mere demand by the creditor without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference.

The words "or which has such effect" in the act apply only to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. *Molsons Bank v. Halter* (18 Can. S. C. R. 88) approved and followed.

Held, per Patterson, J., that any transfer by an insolvent debtor which has the effect of giving one creditor a priority over the others in payment of his debt, or which is given with the intent that it shall so operate, is void under the statute, whether or not it is the voluntary act of the debtor or given as the result of pressure.

Appeal allowed with costs.

Moss, Q.C., and *Wade* for the appellant.

Elliott, Q.C., for the respondent.

Manitoba.]

OTTAWA, Nov. 16, 1891.

ASHDOWN V. MANITOBA FREE PRESS CO.

Libel—Provisions of Act relating to newspapers—Compliance with—Special damages—Loss of custom—50 Vict. cc. 22 and 23, (Man.)

By section 13 of 50 Vict. c. 22, (Man.) "The Libel Act," no person is entitled to the benefit thereof unless he has complied with the provisions of 50 Vict. c. 23, "An act respecting newspapers and other like publications." By section 1 of the latter act no person shall print or publish a newspaper until an affidavit or affirmation, made and signed, and containing such matter as the act directs, has been deposited with the prothonotary of the Court of Queen's Bench or Clerk of the Crown for the district in which the newspaper is published.

By section 2 such affidavit or affirmation shall set forth the real and true names, etc, of the printer or publisher of the newspaper and of all the proprietors; and by sec. 6 if the number of publishers does not exceed four the affidavit or affirmation shall be made by all, and if they exceed four it shall be made by four of them; sec. 5 provides that the affidavit or affirmation may be taken before a justice of the peace or commissioner for taking affidavits to be used in the Court of Queen's Bench.

Held, affirming the decision of the Court of Queen's Bench (6 Man. L. R. 578), 1. That 50 Vict. c. 23, contemplates and its provisions apply to the case of a corporation being the sole publisher and proprietor of a newspaper.

2. That sec. 2 is complied with if the affidavit or affirmation states that a corporation is the proprietor of the newspaper and prints and publishes the same. Gwynne, J., dissenting.

3. That the affidavit or affirmation, in case the proprietor is a corporation, may be made by the managing director.

4. That in every proceeding under sec. 1 there is the option either to swear or affirm, and the right to affirm is not restricted to members of certain religious bodies or persons having religious scruples.

5. That if an affidavit or affirmation purports to have been taken before a commissioner, his authority will be presumed, and need not be proved in the first place.

By sec. 11 of the Libel Act, actual malice or culpable negligence must be proved in an action for libel unless special damages are claimed.

Held, that such malice or negligence must be established to the satisfaction of the jury, and if there is a disagreement as to these issues the verdict cannot stand.

Held, further, that a general allegation of damages by loss of custom is not a claim for special damages under this section.

Per Strong, J.—Damages by loss of custom must be specifically alleged and the names of the customers given, otherwise evidence of such damages is inadmissible.

Appeal dismissed with costs.

McCarthy, Q.C., for appellant.

Robinson, Q.C., for respondents.

Ontario]

OTTAWA, Nov. 16, 1891.

ELECTRIC DESPATCH CO. v. BELL TELEPHONE CO.

Contract—Telephone service—Transmission of messages—Construction of term—Breach.

The Bell Telephone Company sold to the Electric Despatch Company all its messenger, cab, etc, business in Toronto and the good-will thereof, and agreed, among other things, that they would in no manner, during the continuance of the agreement, transmit or give, directly or indirectly, any messenger, cab etc, orders to any person or persons, company or corporation, except the Electric Despatch Co. An action was brought for breach of this agreement, such alleged breach consisting of the Bell Telephone Company's allowing their wires to be used by their lessees for the purpose of sending orders for messengers, cabs, etc.

Held, affirming the judgment of the Court below, (17 Ont. App. R. 292) and of the Divisional Court (17 O. R. 495), Ritchie C. J., doubting, that the Telephone Company could not restrict the use of the wires by their lessees; that being ignorant of the nature of communications made over the wires by persons using them, the Company could not be said to "transmit" the messages within the meaning of the agreement, and that they were under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all messages sent over the wires and prevent any being sent relating to messenger, cab etc orders.

Appeal dismissed with costs.

Robinson, Q. C., and *Moss, Q. C.*, for appellants.

Lash, Q. C., for respondents.

COURT OF QUEEN'S BENCH.

QUEBEC, May 4, 1885.

Coram DORION, C.J., RAMSAY, TESSIER, CROSS, BABY, JJ.

TOURVILLE et al. (plaintiffs in Court below), appellants, and
BRITISH AMERICA ASSURANCE Co. (defendant in Court below).
respondent.

Procedure—Service—Exception to the form.

HELD:—Where the defendant, by exception to the form, attacks merely the sufficiency of the service, and it appears that the service is in fact insufficient, the Court in maintaining the exception

should not dismiss the action, but should reserve to the plaintiff the right to adopt the necessary proceedings to have a proper service made of the action as provided by law, more especially where the dismissal of the suit would cause the right of action to be prescribed.

• **APPEAL** from a judgment of the Superior Court, Three Rivers (BOURGEOIS, J.), Nov. 8, 1884, maintaining an exception to the form pleaded by the respondent, and dismissing the action. The judgment is in the following terms:—

“La Cour, après avoir entendu les parties par leurs avocats sur l'exception à la forme de la dite défenderesse, etc.....

“Considérant que la dite défenderesse a fait la preuve des allégations essentielles de sa dite exception à la forme, et que la dite exception est bien fondée ;

“Maintient la dite exception à la forme de la dite défenderesse, déclare l'assignation en cette cause irrégulière et nulle, et renvoie l'action des dits demandeurs sauf aux demandeurs à se pourvoir, avec dépens, distraits, etc.”

The action was brought by the appellants to recover the sum of \$5,000, amount of a policy of insurance issued by the respondent in favor of one Duval, and transferred by Duval to the appellants.

The respondent is a foreign corporation having its principal establishment at Toronto. At the time the policy was issued the company respondent had an agent at Three Rivers, who at the same time was agent of several other insurance companies.

The appellants pleaded a declinatory exception which was dismissed. They also pleaded an exception to the form, which was maintained by the Court below, and the action dismissed.

The exception to the form alleged:

“Que la défenderesse (l'intimée) est une compagnie étrangère ayant son bureau principal à Toronto, dans la province d'Ontario ;

“Qu'elle n'a pas de bureau à Trois-Rivières, ni d'agent à qui la signification d'une action puisse être légalement faite ;

“Que l'assignation en cette cause est en conséquence irrégulière et illégale.”

The appellants complained especially of the part of the judgment which dismissed their action. By their factum in appeal they submitted the following argument:—

“Si l'assignation était insuffisante aux yeux de la Cour, le jugement devait déclarer l'assignation irrégulière, mais non pas débouter la demande en cette cause. Cette demande était en

effet régulière et suffisante, et le bref de sommation émané en cette cause, était encore, malgré la prétendue insuffisance de l'assignation, un procédé régulier et utile, et pouvant servir de base à une nouvelle assignation, c'est-à-dire à l'assignation pourvue par l'article 62 du C. P. Ce bref n'était entaché d'aucune irrégularité, d'aucun vice, et puisqu'il pouvait encore servir, il n'y avait donc pas lieu de renvoyer l'action et de priver les appelants des droits acquis par l'institution même de l'action. L'intimée ne se plaignant, par son exception, que de l'insuffisance de l'assignation, la Cour ne devait pas rejeter la demande, mais bien se contenter de déclarer l'assignation irrégulière, si elle l'était.

"Pourquoi, en effet, débouter la demande lorsqu'elle est régulière, suffisante et légale, et qu'il n'y a qu'un simple défaut dans l'assignation; pourquoi surtout la rejeter, lorsque le bref et la demande sont encore valables, malgré l'irrégularité de l'assignation, et que la même action peut servir? En la rejetant, c'est faire encourir au demandeur des frais inutiles, c'est aussi quelque fois l'exposer à perdre même tous ses droits, comme dans le cas actuel. En référant à la police d'assurance sur laquelle est basée l'action en cette cause, on voit en effet que le recouvrement du montant de l'assurance ne peut être demandé en justice, à moins que l'action ou poursuite ne soit commencée dans l'année que la perte de la chose assurée a eu lieu. C'est là une condition essentielle, et la clause 15 de la police en question, prononce la déchéance de tous les droits de l'assuré si l'action n'est instituée dans l'année de l'incendie.

"Pigeau, 1er vol., p. 159, dit que les juges ne doivent pas admettre les nullités dont se plaignent les parties lorsqu'il y a mauvaise foi de leur part, comme lorsqu'elles ont éludé de répondre afin d'acquiescer une prescription. Sous les circonstances, la Cour ne devait pas débouter cette action qui avait été prise en temps utile, lorsque surtout l'intimée s'était plaint de cette assignation dans un temps peu éloigné de la prescription, et que le jugement de la Cour exposait les appelants à perdre leur créance."

The appeal was maintained by the following judgment:—

"The Court of Our Lady the Queen now here, having heard the appellants and respondents by their counsel respectively; examined as well the record and proceedings in the Court below as the reasons of appeal filed by the said appellants and the answers thereto, and mature deliberation on the whole being had:

"Considering that, as it appears by the evidence in this cause, the company respondent had no office in the city of Three Rivers when the service of the action was made;

"And considering that although W. C. Pentland, upon whom the service was made, was at the time the agent of the company respondent with limited powers and for certain purposes only, and it does not clearly appear that he was such an agent as is contemplated by article 61 of the Code of Civil Procedure, upon whom a valid service of this action could have been made;

"And considering that it appears by the evidence in this cause that the company respondent has its principal office in the province of Ontario;

"And considering that although the service made in this cause appears to be insufficient, yet under the circumstances a valid service of the action can still be made, as provided for by article 62 and also by article 69 of the Code of Civil Procedure;

"And considering that instead of dismissing the action of the appellants on the ground that the service was insufficient, the Court below should have merely declared the service made insufficient, and allowed the appellants to make a proper service of the action as they had a right to do, and thereby preserve their right of action;

"The Court doth reverse the judgment rendered by the Court below on the 8th of November, 1884, and proceeding to render the judgment which the said Superior Court should have rendered, doth declare that the service of the present action is insufficient and null, and doth reserve to the appellants the right to adopt the necessary proceedings to have a proper service made of the action as provided by law against a foreign corporation;

"And the Court doth condemn the appellants to pay to the respondent the costs incurred on the exception *à la forme* of the said respondent and proceedings had thereon in the Court below;

"And as to the costs in appeal,

"Considering the appellants might have some reason to believe that W. C. Pentland, through whom the contract of insurance on which this action was made, was an agent on whom the action could be served, yet there was some default on their part in not making proper inquiries on the subject, it is hereby ordered that each party shall pay his own costs on the present appeal."

Judgment reversed.

P. N. Martel for appellants.

Honan & Tourigny for respondent.

INSOLVENT NOTICES.

*Quebec Official Gazette, Feb. 6, 13, 20.**Dividends.*

- BARBEAU, L., grocer, Montreal.—First and final dividend, payable March 9, C. Desmarteau, Montreal, curator.
- BILODEAU & Godbout, Quebec.—First and final dividend, payable March 1, H. A. Bedard, Quebec, curator.
- BOWER, William F., Malbaie.—First and final dividend, payable Feb. 29, J. T. Tuzo, Percé, curator.
- BOYER & Co., Jules, St. John's.—First and final dividend, payable March 1, C. Desmarteau, Montreal, curator.
- BRISEBOIS, Pierre, grocer, Montreal.—First and final dividend, payable March 10, C. Desmarteau, Montreal, curator.
- CADIEUX, J. B., grocer, Montreal.—First and final dividend, payable March 11, C. Desmarteau, Montreal, curator.
- CAMPBELL & Co., Kenneth.—First and final dividend (30 c.), payable Feb. 23, A. W. Stevenson, Montreal, curator.
- CHAMBERLAND, Théo., Quebec.—Second and final dividend, payable March 1, H. A. Bedard, Quebec, curator.
- DÉRY & Co., St. Charles.—First and final dividend, payable Feb. 23, D. Arcand, Quebec, curator.
- DION, C., Three Rivers.—First dividend, payable March 15, Kent & Turcotte, Montreal, joint curator.
- EXCHANGE Bank of Canada.—Dividend (2 c.), payable Feb. 16, Campbell & Stearns, liquidators.
- GABOURY, A., Montreal.—Amended dividend, payable March 8, Kent & Turcotte, Montreal, joint curator.
- GAGNÉ, O., Sorel.—First dividend, payable March 15, Kent & Turcotte, Montreal, joint curator.
- GAUTHIER, A., Montreal.—First and final dividend, payable March 15, Kent & Turcotte, Montreal, joint curator.
- GERMAIN, Gaspard.—Second and final dividend, payable March 8, D. Guay, Quebec, curator.
- GIROUX, Francis, Montreal.—Second and final dividend, payable March 15, Kent & Turcotte, Montreal, joint curator.
- GODBOUT & Bergeron, Quebec.—Second and final dividend, payable March 1, H. A. Bedard, Quebec, curator.
- HAMILTON, John, New Glasgow.—First dividend, payable March 15, Kent & Turcotte, Montreal, joint curator.
- JARRY, H. V.—First and final dividend, payable Feb. 24, C. Desmarteau, Montreal, curator.

THE LEGAL NEWS.

VOL. XV.

APRIL 15, 1892.

No. 8.

SUPREME COURT OF CANADA.

OTTAWA, Feb. 23, 1892.

New Brunswick.]

GUARDIAN ASSURANCE CO. v. CONNELLY.

*Fire insurance—Application—Description of building—Variance—
Falsa demonstratio non nocet.*

An insurance policy insured goods in a one-and-a-half story building with shingled roof, occupied as a storehouse for storing feed and provisions, said building shown on plan on back of application for insurance as "feed house," situate attached to woodshed of assured's dwelling house. The building marked feed house on the said plan was not a one-and-a-half story building with shingled roof, was not attached to the wood shed, and was not used as a store house; but another building on the plan answered the description in the policy, and the goods insured were in said last mentioned building when they were destroyed by fire. The plan had been drawn by a canvasser who had obtained the application. He was not a salaried officer of the insurance company, but received a commission on each policy obtained through his efforts.

The insurance company refused to pay the loss, claiming that the policy was made void by the alleged misrepresentation as to the building. On the trial of an action on the policy the jury found for the plaintiff, leave being reserved to move for nonsuit on the ground of misrepresentation. The full Court refused to nonsuit.

Held, affirming the judgment of the Court below, there was no misrepresentation; that the company was in no way damnified by the misdescription in the plan, and the maxim *falsa demonstratio non nocet* applied; that if that maxim did not apply the matter was one for the jury, who had pronounced on it in favour of the assured; and that it was evident that the intention was to insure goods in the building which really contained them.

Held, also, that the canvasser could not be regarded as the agent of the assured, but was the agent of the company, which was bound by his acts and could not take advantage of his mistake.

Appeal dismissed with costs.

Weldon, Q.C., for appellant.

McLeod, Q.C., for respondent.

Ottawa, Feb. 9, 1892.

Ontario.]

EAST NORTHUMBERLAND ELECTION CASE.—NORTH PERTH
ELECTION CASE.

*Controverted Elections Act—Appeal—Deposit—Proper officer—R.
S. C., c. 9, s. 51—54-55 V., c. 20, s. 12 (D.)*

By sec. 51 of the Controverted Elections Act, R. S. C., ch. 9, as amended by 54-55 V., c. 20, s. 12 (D), a party desiring to appeal from the decision of a judge on a preliminary objection, or from the decision of the judges who have tried the petition, is to deposit the sum specified as security for costs "with the clerk of the Court which gave such decision, or of which the judges who gave such decision are members, or with the proper officer for receiving moneys paid into such Court." By s. 4 of R. S. C., c. 9, as amended, the distribution of cases for trial in Ontario between the Court of Appeal and the several divisions of the High Court of Justice shall, if not prescribed by the law of the province or practice of the Court, be arranged by the judges.

In the North Perth election case the petition was filed in the Chancery division and assigned for trial to two judges of the Queen's Bench Division. The deposit was made to the registrar of the Chancery Division. In the West Northumberland case the petition was filed in the Court of Appeal and trial before two judges of one of the Divisional Courts, the deposit being with the registrar of the Court of Appeal. On motion to quash the appeal:

Held, that making the deposit to the registrar of the Court in which the petition was filed was a sufficient compliance with the act.

Held, further, that in the N. Perth case the deposit was made to the officer who was the accountant of the Supreme Court of Judicature, and, therefore, the proper officer to receive moneys paid into any of the Divisional Courts.

Motion dismissed with costs.

North Perth case :

Lash, Q.C., for the motion.

Aylesworth, Q.C., contra.

West Northumberland case :

Ferguson, Q.C., for the motion.

Aylesworth, Q.C., contra.

Ottawa, Feb. 22, 1892.

[New Brunswick.]

ESSON v. MCGREGOR.

Promissory note—Failure of consideration—Laches.

In an action on a promissory note the defence set up was that it was given in purchase of a machine for polishing wood, which machine did not do the work for which it was purchased and which it was represented to do. At the trial the evidence showed that the machine had been used for a long time in connection with building cars; that the work was under control of a contractor with the defendant; and that the superintendent of defendant's establishment had inspected the cars as they were finished and delivered, as well as watched the progress of the work. Evidence was offered on behalf of the defendant to show that the contractor had never told him that the machine was defective, and he never knew it until the case was tried; and that the machine could not be used until a fan had been attached to it for keeping off the dust. The defendant himself was not examined nor was an effort made to obtain the evidence of the contractor, who had left the province. The jury found in favour of plaintiffs, and a new trial was refused on the ground that defendant must be charged with the knowledge of the contractor, or at all events his superintendent was in a position to discover

the manner in which the machine worked. On appeal to the Supreme Court of Canada:

Held, that the new trial was properly refused.

Appeal dismissed with costs.

McLeod, Q.C., for appellant.

Alward, Q.C., for respondent.

Ottawa, Nov. 20, 1891.

British Columbia.]

BOWKER v. LAUMEISTER.

Deed—Construction of—Trust—Parol evidence of—Enforcement.

A suit was brought to enforce an alleged trust in a deed absolute on its face, or in the alternative, to have the property re-conveyed or sold upon the terms of the alleged agreement. The defendant claimed that he had given valuable consideration for the property, which had been accepted by plaintiff in full satisfaction and payment. At the trial parol evidence was given to establish the alleged trust, and a decree was made granting the alternative relief prayed for, and directing the property to be sold and the proceeds applied, as plaintiff claimed had been agreed. The Court affirmed this decree.

Held, that the existence of the trust having been found as a fact by the Court of first instance, and the finding having been affirmed by the full Court, it should not be disturbed.

Appeal dismissed with costs.

S. H. Blake, Q. C., for the appellant.

Robinson, Q.C., for the respondent.

Ottawa, Nov. 17, 1891.

British Columbia.]

POIRIER v. BRULÉ.

Contract—Rescission—Mistake—Performance of conditions—Revocation of trust.

By a deed made between B. grantor, of the first part, P. grantee of the second part, and certain named persons, trustees, of the third part, B. conveyed his farm with the stock and chattels thereon to the trustees. The trusts declared in the deed were

that the grantee should perform certain conditions intended for the support and maintenance and other advantage of the grantor, and if he survived the grantor the trustees were to convey the property to him; if the grantor should survive, the trustees should reconvey to him. The deed was executed and acted on for some few years when an action was brought by B. to have it set aside on the ground of mistake, he alleging that when he executed it, being illiterate and not understanding the English language, he did not know its terms. The trial judge found that this allegation was proved by the evidence, and ordered the deed to be set aside. The full Court on appeal held against this finding of mistake, but affirmed the decision setting aside the deed on the ground that P, the grantee, had not performed the conditions on which his right to the property, in case he survived, depended. On appeal to the Supreme Court of Canada :

Held, affirming the decision of the Court below, that P. having failed to perform the obligations which he had undertaken the trust in his favour failed, and the trustees held the property in trust for B., in whose favour the law raised a resulting trust.

Appeal dismissed with costs.

S. H. Blake, Q.C., for the appellant.

Gemmell for the respondent.

Ottawa, Nov. 17, 1891.

Ontario.]

CITY OF HAMILTON v. THE TOWNSHIP OF BARTON.

Municipal corporation—Powers of—Right to enter lands of another municipality for sewage purposes—Restrictions—R. S. O. (1887), c. 184, s. 479, ss. 15—51 V., c. 28, s. 20 (O.)

The Municipal Act of Ontario (R. S. O. 1887, c. 184), by section 479 gave power to one municipality to enter upon the lands of another for the purpose of extending a sewer into, or connecting with an existing sewer of, the latter upon such terms and conditions as shall be agreed upon between the respective municipalities, and failing an agreement, upon terms and conditions to be determined by arbitration. If the municipality into which the entry is proposed objects thereto, the arbitrators shall determine not merely the said terms and conditions, but whether or not such entry shall be allowed at all.

By 51 V., c. 28, s. 20, a municipal council may pass a by-law for taking land in or adjacent to the municipality necessary or convenient for the purpose of opening, making, etc., drains, sewers or water courses within its jurisdiction, or enter upon, take and use any land not adjacent to the municipality for the purpose of providing an outlet for any sewer, but subject always to the restrictions contained in the Municipal Act.

Held, affirming the judgment of the Court of Appeal, that the latter Act did not take away the necessity for having the terms and conditions of entering upon lands of another municipality settled by agreement or by arbitration as provided by s. 179 of The Municipal Act.

Appeal dismissed with costs.

MacKelcan, Q.C., and *Moss, Q.C.*, for the appellant.

S. H. Blake, Q.C., for the respondent.

Ottawa, Nov. 17, 1891.

New Brunswick.]

SIMONDS v. CHESLEY.

Trespass to land—Title—Application for new trial—Misdirection—Misconduct of jurors—Nominal damages.

S. brought an action against C. for trespass on his land by placing ships' knees thereon, whereby S. was deprived of the use of a portion of the land and prevented from selling or leasing the same. On the trial S. gave no evidence of substantial damage suffered by the trespass, but contended that an action was necessary to preserve his title. The defendants, however, did not set up title in themselves, but only denied that plaintiff had title. Before the verdict was given the jury viewed the premises, one of the conditions on which the view was granted being that "nothing said or done by any of the parties or their counsel should prejudice the verdict." The jury found a verdict in favour of C., and S. moved for a new trial on the ground of the misdirection and misconduct of the defendant's counsel at the view. The Court below refused a new trial.

Held, that by the terms on which the view was granted S. could not set up misconduct thereat in support of his application.

Held, further, that there was no misdirection, but if there was, all that S. could obtain at a new trial would be nominal damages, and it was properly refused by the Court below.

Appeal dismissed with costs.

Skinner, Q.C., and *Simonds*, for appellant.

Currie for respondents.

COUNTY COURT, COUNTY OF YORK.

February 2, 1892.

Before McDougall, J. C. C.

GRIFFITH V. CANADIAN PACIFIC R. Co.

Railway—Animals killed while straying on track—Special case.

Where cattle or horses, not being unruly or breachy, lawfully pasturing upon the land of their owner, situate in a township with an organized municipal corporation which has passed no by-laws respecting cattle running at large, escape from the land of their owner, without any negligence on the part of plaintiffs or defendants, to adjoining land within the same township, which adjoining land is unfenced, and upon which horses and cattle were in the habit of going without any objection by the owner of such adjoining land, but without any express permission from him, and thence wander on to the line of a railway in consequence of the railway company having omitted to erect a fence along the side of the railway, and are there killed by a passing train, the company are not liable to the owner of the cattle and horses for damages caused by the death of the animals.

McDOUGALL, J. C.C. :—

The matter for decision herein is upon the facts of a special case agreed upon by counsel in the following terms:—

“Where cattle or horses not being unruly or breachy, lawfully pasturing upon the land of their owner, situate in a Township in the District of Nipissing (which Township has an organized Municipal Corporation and a portion of which has been surveyed and subdivided into lots for settlement, and which corporation has passed no by-laws respecting cattle running at large) escape from the said land of their owner without any negligence on the part of the plaintiffs or defendants, on to adjoining land within the same Township, which adjoining land is unfenced, and upon which horses and cattle were in the habit of going without any objection by the owner of such adjoining land, but without any express permission from him, and from the said adjoining land wander on to the line of a railway through the said Township, (which railway is subject to the provisions of the Railway Act) at a point within the said Township, in consequence of the Railway Company having omitted

"to erect a fence along the side of the Railway, and are there killed by a passing train. Is the Railway Company liable to the owner of the cattle and horses for damage caused by the death of such animals? All the admissions of facts herein made are to be taken only for the purpose of this stated case, and neither party to be bound thereby in case of a trial of this action."

The Railway Act of 1888, 51 Vic. cap. 29, sec. 194 (D.) sub. sec. 1, provides:—"When a municipal council for any Township has been organized, and the whole or any portion of such Township has been surveyed and sub-divided into lots for settlement, fences shall be erected and maintained on each side of the Railway through such Township, of the height and strength of an ordinary division fence," etc.

The third sub-section of section 193 was repealed by 53 Vic. cap. 28, sec. 2 (D.) and the following sub-section substituted therefor:—"If the Company omits to erect and complete as aforesaid any fence or cattle guard, or, if it is completed, the Company neglects to maintain the same aforesaid, and if in consequence of such omission or neglect any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the Company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the Company's trains or engines, and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway, merely for the reason that the owner or occupant of such place has not permitted it to be there," etc.

The stated case admits that the land in question from which the cattle escaped upon the railway track and were killed, was land in a township (in the unorganized territory of Nipissing) having an organized municipal corporation, and so coming within the description of locality to which 51 Vic. (D.) cap. 29, sec. 194, as amended, applies.

Mr. Macdonald cited the case of *Fawcett v. York and North Midland*, 16 Q. B. 610, as an authority for the proposition that the obligation upon the Railway Company to fence both sides of their track was an obligation which made them responsible not only for injuries to cattle of the adjacent land owner getting from his lands upon the track in consequence of the absence of fences, but also for injuries to any cattle straying upon the track through the unfenced lands, and owned by persons other than the adjacent land proprietor. That case was decided upon the

language of an English statute which enacted that the railway company should keep gates closed across the highway, to prevent cattle and horses passing along the highway from entering upon the railway while the gates were closed. The enactment did not, said Patterson, J., say to prevent cattle lawfully passing, etc.; and he held that the straying cattle were on the highway *lawfully* as against the railway company, and that they, the railway company, were bound to keep their gates closed as against everything, whether straying or passing on the highway. It was the fault of the companies that the gates were open, and in consequence of their fault the accident happened.

Renaud v. Great Western Railway Co., 12 U.C. Q.B. 408, was another case of cattle getting upon the railway track from a highway, and being killed, and the Court held, *dubitante*, that the companies were bound to erect gates across the highway and keep them closed—but if not so bound that they were guilty of negligence in crossing the highway at too great a speed, the said negligence causing the accident.

Parnell v. Great Western Railway, 4 C.P. 517—another highway case—was to the same effect as *Renaud v. Great Western*; but there the Court held—McLean, J., dissenting—that the railway company were bound to put gates on the highway, and that their absence was the cause of the killing of plaintiff's horses which were straying upon the highway, and that the company were liable.

McLellan v. Grand Trunk, 8 C.P. 411; *Gillis v. G.W.R. Co.*, 12 U. C. Q.B. 427; *Douglass v. G.T.R.*, 5 App. 585—all show that under the old Railway Act the Railway Company were only bound to fence as against adjacent land proprietors, and that A's horse getting upon the track from B's land by reason of a defect in B's fence, and being killed, the animal having no right to be upon B's land, A. could not recover damages against the railway company for its loss.

What change, then, has there been in the Railway Act since these decisions? I have set out the clauses in the present Railway Act at the commencement of this judgment. The new section says that if "any animal gets upon the railway from an adjoining place *where under the circumstances it might properly be*, then the company shall be liable to the owner if it is injured or killed by reason of its getting upon the track through the negligence of the railway in not fencing."

What is meant by the expression: "Where under the circum-

stances it might properly be"? McMahan, J., in *Duncan v. C.P.R.*—(not yet reported, but I have been favoured with a copy of his considered judgment)*—holds that these words are equivalent to: "it might lawfully be"; and this construction seems to be the only reasonable meaning that can be attached to this somewhat loosely-worded sentence.

Now, there was no by-law of the Township relating to the running at large of cattle; and hence I am of opinion that in the absence of a by-law the common-law rule will prevail, and that all persons are bound under that rule to keep their cattle from trespassing upon the lands of others. Mr. Macdonald urged that the latter clause of sub-section 3 of section 194 as amended, helped his contention, in that cattle upon another man's land were not to be held to be improperly there, because not expressly permitted to be there by the owner of the land; but the rider to this part of the section is contained in the earlier words, which apply only to animals *allowed by law to run at large*. It being admitted that there is no by-law, I need only cite the case of *Crowe v. Steeper*, 46 U.C. Q.B., 91, as showing that the common-law rule can only be abrogated by clear and unequivocal words either in a statute or a by-law. The concluding portion of sub-section 3 of section 194, therefore, does not help the plaintiff.

Mr. MacDonald also referred to R.S.O. cap. 91, sec. 82; but I do not see its application to this case, and I agree with the view expressed by McMahan, J., in *Duncan v. C.P.R.*, that it seems to have been drawn in ignorance of the common-law rule as to the running at large of cattle.

I must therefore answer the query raised by the stated case by holding that the Railway Company would not be liable upon the facts therein submitted.

Stay of proceedings ordered for 30 days to give plaintiffs time to appeal.

Harvey & McDonald for plaintiffs.

Wells & MacMurchy for defendants.

NEW TRIAL.—The English Court of Appeal, in a recent case, *Ferrand v. Bingley Township District Local Board*, granted a new trial on the sole ground that the verdict was against the weight of evidence.

* See *ante*, p. 14.

*INSOLVENT NOTICES.**Quebec Official Gazette, Feb. 6, 13, 20.*

LANGÉVIN, Appolinaire, cheese-maker, Ste. Cécile de Milton.—First and final dividend, P. S. Grandpré, St. Valérien de Milton, curator.

LARUE, W. H., Murray Bay.—First and final dividend, payable March 8, H. A. Bedard, Quebec, joint curator.

LEMYRE, N. P., Maskinongé.—First and final dividend, payable March 1, H. A. Bedard, Quebec, curator.

LOISEAU, J. E. A.—First and final dividend, payable Feb. 22, Bilodeau & Renaud, Montreal, joint curator.

MARION, Sévérin, hotel-keeper, St Félix de Valois.—First and final dividend, payable March 16, at office of H. Champagne, curator, St. Gabriel de Brandon.

MARTIN, fils & Co., Rimouski.—First dividend, payable March 15, Kent & Turcotte, Montreal, joint curator.

MORRIER, D., Capelton.—First and final dividend, payable Feb. 22, Royer & Burrage, Sherbrooke, joint curator.

RENAUD, X.—Second and final dividend, payable Feb. 26, C. Desmarteau, Montreal, curator.

TURGEON, Z., Montreal.—First and final dividend on proceeds of real property, payable March 15, Kent & Turcotte, Montreal, joint curator.

VINEBERG, J. L., Sherbrooke.—First dividend, payable March 15, Kent & Turcotte, Montreal, joint curator.

VINETTE, Dame A. S., Montreal.—First and final dividend, payable March 3, C. Desmarteau, Montreal, curator.

*Quebec Official Gazette, Feb. 27, March 5, 12, 19, 26.**Judicial Abandonments.*

ALLARD, HENRI, tobacconist, Montreal, March 1.

DÉCHÈNE & CIE., F. M., dry goods dealers, Quebec, March 11.

DESCHÈNE, GEORGE HONORÉ, St. Epiphane, March 18.

DIONNE, JOSEPH M., St. Antoine, Feb. 19.

HUOT & LANGÉVIN, Quebec, Feb. 19.

HURTEAU, J. ARTHUR, boot and shoe dealer, Montreal, Feb. 20.

INGLIS, ERNEST C., Brome, March 9.

KNAPTON, JOSEPH HENRY, Bedford, Feb. 20.

LABBÉ & Co., Jos., tea merchants, Quebec, Feb. 15.

LAVERGNE, JOS. ELZÉAR, Ste. Louise, l'Islet, March 5.

LEMAY, J. N. F., St. Côme, Beauce, March 7.

PALARDY, MARC, Eastman, Feb. 12.
 PAYER, HECTOR, Ste. Hélène de Chester, March 3.
 PELLETIER, JOSEPH, St. Jean Port Joli, March 14.
 POIRIER, JOSEPH, Metapedia, March 18.
 ROSS, REGIS, Cedar Hall, Feb. 20.
 ROY, PIERRE E., Coaticook, March 17.
 RUSSELL, H. C. & Co., iron and steel merchant, Montreal, Feb. 26.
 SOUCY & Co., E., Quebec, Feb. 25.

Curators Appointed.

ALLARD, HENRI, Montreal.—C. Desmarteau, Montreal, curator, March 9.
 BÉRÉ, J. THÉOP.—D. N. Germain, Montreal, curator, Feb. 19.
 BERTRAND, DAVID.—J. B. Prince, Trois Pistoles, curator, Feb. 10.
 BESSETTE, DAME A.—C. Desmarteau, Montreal, curator, Feb. 21.
 BILODEAU, JEAN, St. Elzéar, and J. BILODEAU & FILS, Ste. Marie.—H. A. Bedard, Quebec, curator, Feb. 27.
 BISSON, H. & J.—A. Lemieux, Lévis, curator, March 7.
 BOUVIER, ALEXIS, St. Barnabé.—J. Morin, St. Hyacinthe, curator, March 5.
 BROUSSEAU, MILES R., St. Paul d'Abbottsford.—L. N. Belisle, St. Pie, curator, Feb. 26.
 CAMPBELL, PETER, mill owner, Lachute.—W. J. Simpson, Lachute, curator, Feb. 22.
 CALEDONIAN LAUNDRY Co., Montreal.—W. A. Caldwell, Montreal, liquidator, March 1.
 CAMPBELL & FERGUSON, Sherbrooke.—J. McD. Hains, Montreal, curator.
 COMPAGNIE CANADIENNE DES CONDUITES d'EAU.—A. W. Stevenson, Montreal, liquidator, Feb. 27.
 CRAVEN & Co., W. A., Montreal.—A. F. Riddell, Montreal, curator, March 1.
 DÉCHÈNE & Co., F. M., Quebec.—G. H. Burroughs, Quebec, curator, March 23.
 DEVAULT, GEO. C., Montreal.—C. Desmarteau, Montreal, curator, March 18.
 DIONNE, JOS. M., St. Antoine.—H. A. Bedard, Quebec, curator, March 10.
 FISH, JAMES, Lachute.—W. J. Simpson, curator, Feb. 22.
 HOLLAND & Co., R. H., Montreal.—A. W. Stevenson, Montreal, curator, March 9.
 HUOT & LANGEVIN, Quebec.—H. A. Bedard, Quebec, curator, March 4.

- KNAPTON, JOSEPH H.**, Bedford.—J. McD. Hains, Montreal, curator, Feb. 29.
- LABBÉ & Co.**, Jos., Quebec.—N. Matte, Quebec, curator, Feb. 29.
- LAFORTUNE, NAPOLEON**, Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 19.
- LEFÈVRE, J. F.**, cigar manufacturer, Montreal.—C. Desmarteau, Montreal, curator, Feb. 20.
- MONGENAIS, L. N.**, Rigaud.—Lamarche & Olivier, Montreal, joint curator, March 5.
- MORIN & CIE., DR. ED.**, Quebec.—H. A. Bedard, Quebec, curator, March 3.
- NAUD, F. X.**, St. Casimir.—G. H. Burroughs, Quebec, curator, March 1.
- PALARDY, MARC**, Eastman.—D. Seath, Montreal, curator, Feb. 22.
- PITON, ALPHONSE**, Quebec.—G. Darveau, Quebec, curator, Feb. 6.
- PROVOST, HUBERT.**—C. Desmarteau, Montreal, curator, Feb. 20.
- RICHNER, CHS.**—M. Cassidy, Montreal, curator, Feb. 18.
- ROBERGE et al.**, F.—J. Shepherd, (office of White & Duclos), Montreal, curator.
- ROSS, REGIS**, Cedar Hall.—H. A. Bedard, Quebec, curator, March 3.
- RUSSELL & Co.**, H. C., Montreal.—John Hyde, Montreal, curator, March 7.
- THIBAudeau & Co.**, U. A. F., St. Célestin.—Lamarche & Olivier, Montreal, joint curator, Feb. 18.
- TRUDEAU, AIMÉ**, Windsor Mills.—Royer & Burrage, Sherbrooke, joint curator, Feb. 23.
- WATERS, ADAM.**—A. C. Joseph, Quebec, curator, Feb. 29.
- YOUNG, LEWIS A.**, Stanstead.—Royer & Burrage, Sherbrooke, joint curator, March 15.

Dividends.

- ANCTIL, L. E.**, Coaticook.—First and final dividend, payable March 22, Royer & Burrage, Sherbrooke, joint curator.
- BAPTIST, SON & Co.**, GEORGE, Three Rivers.—Dividend on proceeds of part of timber limits, payable March 22, Macintosh & Hyde, Montreal, joint curator.
- BEAUCHAMP & Co.**, W., Montreal.—First and final dividend, payable March 28, Lamarche & Olivier, Montreal, joint curator.
- BOUCHARD & BRETON**, Quebec.—Final dividend, payable March 14, N. Matte, Quebec, curator.
- CARDINAL & Co.**—First and final dividend, payable April 4, Bilodeau & Renaud, Montreal, joint curator.

- CLAPIN, LEOPOLD.—First and final dividend, payable March 23, Millier & Griffith, Sherbrooke, joint curator.
- COLE, F. R., Montreal.—Second dividend, payable March 30, Joseph R. Fair, Montreal, curator.
- CRILLY, JOHN.—Second and final dividend, Wm. Angus, Montreal, curator.
- DESCHÊNES & fils, Quebec.—Final dividend, payable March 14, N. Matte, Quebec, curator.
- DUBUC & Co., Drummondville.—First dividend, payable April 15, Kent & Turcotte, Montreal, joint curator.
- DUGRENIER *et al.*—Dividend, L. Jodoin, Waterloo, curator.
- DUMARESQ & Co., Montreal.—First and final dividend, payable March 15, W. A. Caldwell, Montreal, curator.
- FORTIN, REMI.—First and final amended dividend, payable April 12, Millier & Griffith, Sherbrooke, joint curator.
- GIGUÈRE, RICHARD.—First and final dividend, payable April 4, N. Lambert, curator.
- GODIN, EUGÈNE.—First and final dividend, payable March 19, L. G. G. Beliveau, Montreal, curator.
- GORDON & HOWIE, Stanstead Junction.—First and final dividend, payable March 22, J. McD. Hains, Montreal, curator.
- GUEST, JAMES, Montreal.—Third and final dividend, payable March 15, A. F. Riddell, Montreal, curator.
- HERALD Co., Montreal.—First dividend, payable April 4, W. H. Whyte, Montreal, liquidator.
- HUA, RICHARDSON & Co., Montreal.—First and final dividend, payable April 5, W. A. Caldwell, Montreal, curator.
- HURTEAU, J. A.—First and final dividend, payable April 13, C. Desmarteau, Montreal, curator.
- JOANETTE, JÉRÉMIE, Montreal.—Second and final dividend, payable March 30, C. Desmarteau, Montreal, curator.
- LAFERRIERE, WIDOW J. A., St. Hyacinthe.—First and final dividend, payable April 6, J. O. Dion, St. Hyacinthe, curator.
- LAPERLE, ARTHUR, St. Guillaume d'Upton.—First and final dividend, payable March 16, C. Desmarteau, Montreal, curator.
- LEFÈVRE, J. F.—First and final dividend, payable March 30, C. Desmarteau, Montreal, curator.
- LEFÈVRE, ODINA, Quebec.—First and final dividend, payable March 14, N. Matte, Quebec, curator.
- LOYER, DAME J. S.—Second and final dividend, payable March 23, C. Desmarteau, Montreal, curator.

- MALBŒUF, C. A. L.**, Montreal.—First and final dividend, payable April 15, Kent & Turcotte, Montreal, joint curator.
- MARCHAND, L. E. N.**—First and final dividend, payable April 5, C. Desmarteau, Montreal, curator.
- QUEVILLON, JOSEPH BENOIT**, Coaticook.—First and final dividend, payable April 12, Millier & Griffith, Sherbrooke, joint curator.
- RADFORD BROS & Co.**, Montreal.—First and final dividend (21c), payable March 15, C. R. Black, Montreal, curator.
- RIEPERT & CIE.**—First and final dividend, payable April 15, Kent & Turcotte, Montreal, joint curator.
- ROBERGE, J. L.**, Thetford Mines.—First and final dividend, payable March 21, N. Matte, Quebec, curator.
- ROLLAND, P. L.**—First and final dividend, payable March 18, Bilodeau & Renaud, Montreal, joint curator.
- BOURKE, WM.**, Montreal.—Final dividend, payable March 28, J. N. Fulton, Montreal, curator.
- SLAYTON, T.**, Montreal.—First and final dividend, payable April 5, W. A. Caldwell, Montreal, curator.
- TROTTIER, PAUL NOÉ.**—First and final dividend, payable March 26, C. Fortin, Beauharnois, curator.

GENERAL NOTES.

CONTRACTUAL CAPACITY OF THE INSANE.—In *Imperial Loan Company v. Stone* (1892) 8 Times L. R. 408, the Master of the Rolls dealt with the old cases as to the contractual capacity of the insane with a truly refreshing freedom. The action was brought to recover the balance due upon a promissory note. The defendant, who signed the note as surety, pleaded that when he did so he was of unsound mind and incapable of understanding what he was doing, as the plaintiffs well knew. The action was tried before Mr. Justice Denman and a jury. The jury found that the defendant was not of sane mind, but differed as to whether or not the plaintiffs were aware of the fact. Thereupon Mr. Justice Denman entered judgment for the defendant; but this decision was reversed by the Court of Appeal, on the ground that, under *Molton v. Camroux*, 18 Law J. Rep. Exch. 68, the onus of proving that the plaintiff knew of his insanity rests upon the defendant. 'If we went through all the cases on the question,' said the Master of the Rolls, 'and endeavoured to point out the grounds on which they rest, one would get into a maze. The time has come when this Court must lay down the rule..... The law of England is as follows: When a person enters into an

ordinary contract and afterwards alleges that he was insane at the time.....and proves that he was so by the law of England, that contract, *whether executory or executed*, is as binding upon him in every respect as if he were sane, unless he can prove that at the time he made the contract the plaintiff knew that he was insane, and so insane as not to know what he was about.'—*Law Journal*, (London.)

ISSUE OF SHARES AT A DISCOUNT.—The decision of the House of Lords last week in the case of *The Ooregum Gold Mining Company of India* has finally settled the principle laid down in *The Almada and Tiritto Case*, 57 Law J. Rep. Chanc. 706, that a company cannot issue its shares at a discount. There can be no question that the decision is as sound in morality as it is in law; but in the particular case before the House there was considerable hardship involved. The transactions assailed had proved beneficial to the company, and had, indeed, saved it from destruction, and the interest of creditors was not in issue. The action was brought by a shareholder, avowedly for the purpose of benefiting the holders of ordinary shares at the expense of owners of the preference shares, which had been issued at a discount. It is important to note that both Lord Watson and Lord Herschell are of opinion that there is nothing in the Acts to prevent a company from issuing shares at a price less than their nominal value, under a contract with the holders that the company shall not call upon such shareholders for any further payment, except in the case of a winding-up, and then only for the discharge of the obligations of the company and the costs of winding-up. Unfortunately no such contract could be inferred in the *Ooregum Case*, for, as Lord Watson put it, to do so would be to infer that 'a single resolution that no money shall be paid in any event is severable into two distinct resolutions—one to the effect that there shall be no payment, and the other to the effect that there shall be no payment on the occurrence of a certain event'.—*Law Journal*.

DELAYS OF JUSTICE.—Mr. Justice Lawrance, of the English bench, referring recently to complaints respecting delays in the administration of justice, observed that there seemed to be an idea that directly a case arose a judge ought to be ready to try it. Of course the object to be aimed at and attained was to keep well up with the work, but the idea of having a judge always ready to try a case was absolutely absurd and not capable of accomplishment.

THE LEGAL NEWS.

VOL. XV.

MAY 2, 1892.

No. 9.

CURRENT TOPICS AND CASES.

The question of increasing judicial salaries has once more been brought before Parliament. The augmentation proposed is a moderate one, being an addition of \$1,000 per annum to the city judges, and \$500 to those resident in the country districts. There ought not to be any opposition to this proposal. Considering the time which has elapsed since the last adjustment of salaries, it is really no increase at all, but merely an adjustment of figures to correspond with the changed value of money. It is not clear yet, however, whether the amended scale can be carried. Perhaps there would not be so much opposition, if the understanding that judges shall confine themselves to their judicial duties were more faithfully and generally observed.

The number of applications to the legislature for bills admitting individuals to the professions seems to be on the increase. At present there are five such applications pending at Quebec for admission to the practice of law; four for admission to the medical profession, and one for admission to the practice of dentistry. As regards the legal profession, the General Council of the Bar would

appear to be the proper body to deal with such applications. Additional powers might be vested in them to authorize the examination of candidates who have failed, for some reason which can be satisfactorily explained, to comply with the ordinary conditions which entitle students to examination.

The retirement of the Hon. Mr. Justice Tessier, of the Court of Queen's Bench, has been followed, at a short interval, by his decease. The learned judge was in his seventy-fifth year. His career at the bar extended over 34 years—from 1839 to 1873. He was Mayor of Quebec in 1851. He also sat in the House of Assembly and in the Legislative Council before Confederation, and was subsequently called to the Senate of Canada. From 1875 to 1891 he was a judge of the Court of Queen's Bench. Mr. Justice Tessier was a sound lawyer, and in the discharge of his official functions was distinguished by impartiality, urbanity and dignity. He leaves nothing but pleasant recollections to the large circle who were connected with him in his long and useful career.

Our civil code, Art. 1676, declares in effect that carriers cannot validly contract that they shall be exempt from losses caused by their fault or negligence. In *Mongenais & Allan*, the Court of Appeal, March 24, 1892, held that this does not prevent a carrier from making special conditions as to the carriage of goods requiring special care in the handling, by exacting a declaration as to the nature of the goods and the payment of a higher rate. And where the shipper does not make such declaration and pay the higher rate, the carrier is not liable for damage which occurs where ordinary care is taken, even if it appears that the loss would probably have been avoided if the goods had been handled with the care applied to fragile and costly freight.

**THE CROWN NOT RESPONSIBLE FOR GOODS
STOLEN FROM EXAMINING WAREHOUSE.**

The case of *Corse et al. v. The Queen*, decided by Mr. Justice Burbidge in the Exchequer Court of Canada, in the end of March, involves an important principle. The Court holds that where goods are stolen while in the custody of customs officers, the injured person has no action against the Crown, and no remedy except such as he may have against the officer through whose personal negligence or fault the loss happens. The authorities are carefully resumed in the opinion the text of which we give below.

BURBIDGE, J. :—

The plaintiffs seek to recover from the Crown the sum of \$465.74 and interest, for the value, including the duty paid, of a quantity of glazier's diamonds alleged to have been stolen from the box at the examining warehouse at the port of Montreal, in which they had been shipped at London. On Friday, the 21st of February, 1890, the box mentioned was, it appears, in bond at a warehouse for packages at Point St. Charles, Montreal, used by the Grand Trunk Railway Company. On that day the plaintiffs made an entry of the goods at the Custom House and paid the duty thereon (\$107.10). On Monday, the 24th, Owen Smith, the Customs' officer in charge of the warehouse at Point St. Charles, delivered the box to Daniel O'Neil, the foreman of the Custom house carters, who, in his turn, delivered it to John Mooney, one of the carters, who took it, with other parcels, and delivered it to Owen Ahearn, a checker at the Customs examining warehouse. The box was then put on a lift and sent up to the third floor of the building, where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen.

The bottom of the box, by removing which the theft had been effected, had not been skilfully replaced, and one of the nails used to fasten it on had come out at the side of the box. This nail was not, it appears, noticed by any of the persons who saw or handled the box until after it had been opened and the loss discovered.

O'Neil, Mooney and Ahearn think that they would have noticed the nail if it had been exposed when the box passed through

their hands. Smith was not at all sure that he would have done so, because he handles many boxes, and it was the carter's business to object if the box was not in good order; though if he had noticed the nail the fact would, he thinks, have struck him. On the other hand, Labelle, who opened the box in the examining warehouse, and those who were with him, do not appear to have observed that anything was wrong with it until after the box had been opened and found to be empty.

On this state of facts I am asked by the plaintiffs to find that the theft was committed while the box was at the examining warehouse, and although the evidence is not to my mind conclusive one way or the other, I shall accede to the plaintiffs' contention, and, for the purposes of the case, draw that inference from the facts proved.

For the loss of the goods under these circumstances the plaintiffs argue that the defendant is liable. With that view I cannot agree.

Even if it were possible under the authorities to hold that the Crown was, in the ordinary acceptance of the word, a bailee of the goods in question, and bound in keeping them to that degree of diligence which the law exacts, for example, of such special or quasi-bailees as captors or revenue officers, the plaintiffs would, I think, fail. (Story on Bailments, ss. 38, 39, 444-450, 613-618; *Finucane v. Small*, 1 Esp., N.P.C. 315). There is no evidence of want of diligence in keeping the goods, or, if it is to be inferred that they were stolen by a servant of the Crown, of negligence in selecting or retaining the dishonest servant. But the question is not to be determined by the law of bailments. The officer of the Crown who has the custody of goods sent to a customs warehouse for examination may be, and no doubt is, in a sense a bailee of such goods, but the Crown is not. (*Moore v. State of Maryland*, 47 Md. 467; 28 Am. R. 483). For any wrong committed by an officer of the Crown the injured person has his remedy against such officer (*Whitfield v. Le Despencer*, 2 Cowp. 765; *Rowning v. Goodchild*, 2 Wm. Bl. 906; Story on Agency, s. 319), but the Crown is not liable therefor except in cases in which the legislature has expressly, or by necessary implication, imposed the liability and given the remedy. (See authorities cited in *City of Quebec v. The Queen*, 2 Ex. C. R. 257; and in *Burroughs v. The Queen*, 2 Ex. C. R. 298). For United States authorities see *United States v. Kirkpatrick*, 9 Wheaton, 720; *Nichols v. United States*, 7 Wallace, 122; *Gibbons v. United States*, 8 Wallace, 269; *Schmalz*

v. United States, 4 C. of C. R., 142; *Moore v. The United State of Maryland*, 47 Md. 467, 28 Am. R. 483; and *Langford v. United States*, 101 U. S. R. 341). Moreover, the officer answers for his own acts and omissions only and not for those of his subordinates. (Story on Agency, s. 319; *Cotton v. Lane*, 1 Ld. Rayd. 646; *Whitefield v. Le Despencer*, 2 Cowp., 754; *Dunlop v. Monroe*, 7 Cranch, 242; *Wiggins v. Hathaway*, 6 Barb. 632; *Brissac v. Lawrence*, 2 Blatch. 121, 124).

In answer to the suggestion that the Postmaster-General is a carrier of letters and liable for the loss of bank notes stolen therefrom by a sorter in the Post office, Lord Mansfield in giving judgment in *Whitefield v. Le Despencer* (2 Cowp. 764) says that "the Post office is a branch of revenue, and a branch of police, created by Act of Parliament. As a branch of revenue, there are great receipts, but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy, therefore, between the case of the postmaster and a common carrier..... (p. 765). As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the Post office loses any of them he is answerable; so is the sorter in the business of his department. So is the Postmaster for any fault of his own..... (p. 766), but he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, etc., who were never thought liable for any negligence or misconduct of the inferior officers in their several departments."

The principle of the immunity of the state from liability for wrongs committed by its officers is well illustrated in the opinions of the Supreme Court of the United States in a number of cases to which reference has already been made.

Mr. Justice Story in delivering the opinion of the court in the case of *United States v. Kirkpatrick* (9 Wheaton, 735) says that "The general principle is that laches is not imputable to the Government; and this maxim is founded, not in the notion of

"extraordinary prerogative, but upon a great public policy. The Government can transact its business only through its agents, and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses if the doctrine of laches can be applied to its transactions."

This case was approved and followed in *Dox v. Postmaster-General*, 1 Peters, 318. In *Nichols v. United States*, 7 Wall. 126, Mr. Justice Davis, who delivered the opinion of the court, states the rule and the reason therefor as follows:—"The immunity of the United States from suit is one of the main elements to be considered in determining the merits of this controversy. Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the Government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil process the same as a private person."

In the opinion of the court delivered by Mr. Justice Miller in *United States v. Gibbons* (8 Wallace, 274) we find the following:

"No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents. In the language of Judge Story (Story on Agency, s. 319) it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests.' (P. 275.) The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties."

The same judge, delivering the opinion of the court in a later case, in which a question as to the jurisdiction of the Court of Claims was involved, said (*Langford v. United States*, 101 U. S. R. 345):—

"While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only

" be valid as against the United States when made by some
" officer of the Government acting under lawful authority, with
" power vested in him to make such contracts, or to do acts
" which imply them, the very essence of a tort is that it is an
" unlawful act, done in violation of the legal rights of some one.
" For such acts, however high the position of the officer or agent
" of the Government who did or commanded them, Congress did
" not intend to subject the Government to the results of a suit
" in that court. This policy is founded in wisdom, and is clearly
" expressed in the act defining the jurisdiction of the Court, and
" it would ill become us to fritter away the distinction between
" actions *ex delicto* and actions *ex contractu* which is well under-
" stood in our system of jurisprudence, and thereby subject the
" Government to payment of damages for all the wrongs com-
" mitted by its officers or agents, under a mistaken zeal, or ac-
" tuated by less worthy motives."

It is, therefore, always to be borne in mind that for the wrong of the public officer there is no remedy against the state unless the legislature thereof has created the liability and given an appropriate remedy. Of such instances of "liberality of legislation" (to use a term found in the opinion of Mr. Justice Davis that has been cited) the statutes of Canada and other British colonies afford a considerable number of instances. (*The City of Quebec v. The Queen*, 2 Ex. C. R. 252); and in 17 Dalloz Rep. Jur., cap. 10, s. 1, Art. 5, p. 704, will be found a case where the owner of property stolen from a box in the custody of the Customs officers recovered from the administration the value thereof under the provisions of the Customs law of 1791. But there is no suggestion that there is in the case under consideration any statute to aid the plaintiffs. Mr. Curran, for them, pointed out that the case differed from the storage of goods in a bonded warehouse, in which case the importer may exercise his option to leave the goods in the warehouse or not, but that in such a case as the present he has no option, but must submit to having his goods taken to the Examining warehouse to be examined by the officers of the Customs. That is, no doubt, true, and it might be an element to take into consideration if the case depended upon the law applicable to bailees. But we have seen that in such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the col-

lection of the public revenues. Without such a power the state would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy except such as the injured person may have against the officer through whose personal negligence or act the loss happens.

There is another aspect of the case to which it is necessary briefly to refer. If the finding of the court had been as the counsel for the Crown contended it might have been, that the diamonds were stolen before the 21st of February, 1890, it is evident that there was at the time nothing in respect of which any duties were payable, and the plaintiffs would I think have been entitled to a return of the duties paid by them. The plaintiffs' case supported, perhaps, as we have seen by the weight of evidence, was, however, that the theft was committed while the goods were in the Examining warehouse. In that view of the facts of the case, and it is the view in which it is to be disposed of, the duties were rightly paid. There will be judgment for the defendant, and the costs will as usual follow the event.

Curran & Grenier for the plaintiffs.

O'Connor, Hogg & Balderson for the Crown.

ELECTION DE L'ISLET POUR L'ASSEMBLÉE LEGISLATIVE DE QUEBEC.

DÉCOMPTE DES BULLETINS FAIT PAR LE JUGE PELLETIER,
LE 17 MARS 1892.

Bulletins mis de côté :

10. Bulletin ne portant pas les initiales du sous-officier-rapporteur, comme n'étant pas semblable aux autres bulletins.

20. Bulletin ne portant pas les initiales du sous-officier-rapporteur et ne contenant que le nom d'un seul candidat, le reste du bulletin ayant été enlevé avec le talon par erreur évidente, comme non semblable aux autres bulletins.

Bulletins admis :

10. Bulletin marqué d'une croix à gauche du nom du candidat.

20. Bulletin marqué d'une croix à droite mais au-dessus de la ligne du compartiment où est inscrit le nom de M. Casgrain, l'intention du voteur étant de voter pour M. Casgrain, le bulletin ne contenant que deux noms de candidats.

30. Bulletin marqué d'une croix sur le nom même du candidat.
40. Bulletins marqués d'une croix faite de plusieurs barres, mais faisant voir l'intention honnête du candidat de voter sans se faire connaître.
-

PROCEEDINGS IN APPEAL.—MONTREAL.

Tuesday, March 15.

Carrière & Beaudry.—Heard on appeal from judgment of Superior Court, Montreal, Tait, J., April 3, 1890.—C. A. V.

Jetté & Crevier.—Heard on appeal from judgment of Court of Review, Montreal, March 31, 1890.—C. A. V.

Burland & Cushing.—Settled out of Court.

McLaren & Laperrière.—Heard on appeal from judgment of the Superior Court, Montreal, Jetté, J., Jan. 11, 1890.—C. A. V.

Canada Shipping Co. & Davidson.—Heard on appeal from judgment of Superior Court, Montreal, Pagnuelo, J., May 30, 1890.—C. A. V.

Wednesday, March 16.

Dechêne & City of Montreal.—Heard on appeal from judgment of Superior Court, Montreal, de Lorimier, J., Nov. 11, 1890.—C. A. V.

Picault & Guyon Lemoine.—A. & W. Robertson, attorneys for respondent, file suggestion of the death of Pierre Guyon Lemoine, respondent, and of P. E. Picault, appellant.

Dolan & Baker.—Heard on appeal from judgment of Superior Court, Montreal, Taschereau, J., March 8, 1890.—C. A. V.

Canadian Pacific R. Co. & Couture.—Part heard on appeal from judgment of Court of Review, Montreal, Dec. 30, 1890.

Thursday, March 17.

Malo & Gravel.—Heard on appeal from judgment of Superior Court, Montreal, Gill, J., June 7, 1890.—C. A. V.

McBean & Marler.—Part heard on appeal from judgment of Superior Court, Montreal, Jetté, J., June 30, 1890.

Friday, March 18.

McBean & Marler.—Hearing concluded.—C. A. V.

Ahern & U. S. Life Insurance Co.—Heard on appeal from

judgment of Superior Court, Montreal, Mathieu, J., June 11, 1889.—C. A. V.

Chouinard & Berczy.—Appeal dismissed, the appellant not appearing.

De Gagné & Davidson : Tremblay & Davidson.—Part heard on appeal from judgments of the Superior Court, Montreal, Tait, J., Oct. 10, 1890.

Saturday, March 19.

C. P. R. Co. & Couture.—Hearing concluded.—C. A. V.

Cie Chemin de fer Atlantique Canadien & Trudeau.—Heard on appeal from judgment of the Court of Review, Montreal, Jan. 13, 1890.—C. A. V.

Monday, March 21.

De Gagné & Davidson.—Hearing concluded.—C. A. V.

Tremblay & Davidson.—Hearing concluded.—C. A. V.

Auger et al. & Labonté et al.—Part heard on appeal from judgment of Superior Court, Montreal, Pagnuelo, J., Jan. 16, 1892.

Tuesday, March 22.

Scott & McCaffrey.—Heard on appeal from judgments of Superior Court, district of Bedford, Lynch, J., May 2, 1890.—C. A. V.

Lafontaine & Beauchemin.—Heard on appeal from judgment of Superior Court, district of Bedford, Tait, J., Dec. 4, 1889.—C. A. V.

Gilmour & Letourneux.—Part heard on appeal from judgment of Superior Court, district of Bedford, Lynch, J., Nov. 5, 1890.

Wednesday, March 23.

Gilmour & Letourneux.—Hearing concluded.—C. A. V.

Huot & Noisieux ; Noisieux & Huot.—Heard on appeal and cross appeal from judgment of Superior Court, St. Hyacinthe, April 21, 1890.—C. A. V.

Clément & Corporation of St. Scholastique.—Heard on appeal from judgment of Superior Court, Terrebonne, Taschereau, J., March 23, 1892.—C. A. V.

Thursday, March 24.

Carter & McCaffrey.—Judgment reversed and action dismissed with costs.

Marsan & Gaudet.—Judgment reversed, Tait, J., *ad hoc*, diss.

Menard dit Bonenfant & Bryson.—Reversed.

Mongenais & Allan.—Confirmed, with a modification of *motifs*.

Plante & Corporation St. Jean de Matha.—Confirmed.

Canada Investment & Agency Co. & McGregor.—Reversed.

McGregor & Canada Investment and Agency Co.—Cross appeal dismissed.

Church & Bernier.—Reversed.

Vipond & Tiffin.—Confirmed.

Shaw & Norman.—Reversed.

Prieur & de Gaspé.—Reversed, with modification; defendant paying costs in Circuit Court; appeal maintained with costs.

Auger et al. & Labonté et al.—Hearing concluded.—C. A. V.

Saturday, March 26.

Dickinson & Canada Bank Note Co.—The appellant not appearing, appeal dismissed.

Desjardins & Bruchesi.—Motion for leave to appeal from interlocutory judgment; plaintiff files *désistement*. *Acte* granted. Appeal allowed with costs of petition against plaintiff.

City of Montreal & Carr.—Appeal declared abandoned, no proceedings having been had for more than a year.

Rafter & Knowles.—Same order.

Hobbs & Simpson.—Same order.

Union des Abbatoirs & Ville de St. Henri.—Heard on appeal from judgment of Superior Court, Montreal. Cimon, J., April 25, 1890.—C. A. V.

Goldie & Beauchemin & Rasconi.—Heard on appeal from two judgments of Superior Court, Montreal, the first, an interlocutory, Mathieu, J., April 11, 1890; the second on the merits, Wurtele, J., Nov. 17, 1890.—C. A. V.

The Court adjourned to 16th May.

Délibérés after March Term.

From January term:—Vallée & Préfontaine; Dufresne & Préfontaine.

From February term:—Cadieux & Taché; C. P. R. Co. & Collins; C. P. R. Co. & Larmonth; Desorey & Morin; Corporation St. Ours & Morin; Stewart & St. Ann's Mutual Building Society; Lefebvre & Magnan; Canadian Bank of Commerce & Stevenson; Brown & Leclerc; Corporation de Longueuil & Préfontaine.

From March term:—Carrière & Beaudry; Jetté & Crevier; Maclaren & Laperrière; Canada Shipping Co. & Davidson;

Dechêne & City of Montreal; Dolan & Baker; Malo & Gravel; McBean & Marler; Ahern & U. S. Life Insurance Co.; C. P. R. Co. & Couture; Canada Atlantic R. Co. & Trudeau; De Gagné & Davidson; Tremblay & Davidson; Lafontaine & Beauchemin; Gilmour & Letourneux; Huot & Noiseux; Noiseux & Huot; Clément & Corporation Ste. Scholastique; Auger & Labonté; Union des Abattoirs & Ville St. Henri; Goldie & Beauchemin & Rasconi.

RECENT ONTARIO DECISIONS.

Libel—Poster advertising account for sale—Justification.

The defendants M. & B., merchants, placed in the hands of the defendant A., a collector of debts, an account against the plaintiff Sarah G., wife of the plaintiff John G., for collection, well knowing the method of collection adopted by A., who, after a threatening letter to Sarah G., which did not evoke payment, caused to be posted up conspicuously in several parts of the city where the plaintiffs lived a yellow poster advertising a number of accounts for sale, among them being one against "Mrs. J. Green (the plaintiff), Princess Street, dry goods bill, \$59.35." The evidence showed that Sarah G. owed the defendants M. & B., \$24.33 only.

Held, that the publication was libellous and could only be justified by showing its truth; and as the defendants had failed to show that Sarah G. was indebted in the sum mentioned in the poster, they were liable in damages.—*Green v. Minnes*, Queen's Bench Division, Feb. 27, 1892.

Negligence—Accident—Liability of hotel-keeper—Trap-door.

The plaintiff went into defendant's hotel on Sunday as a customer. He had been there several times before. In passing through the building to go to the urinal he fell through an open trap-door which had been left unguarded, and received injuries.

Held, that he was entitled to damages from the defendant.—*Hasson v. Wood*, Chancery Division, March 29, 1892.

Winding-up proceedings—Liquidator's commission—Allowance of commission on set-offs.

Held, that in fixing the liquidator's commission in winding-up

proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set off, but not actually received by the liquidators; and in this case a commission of $2\frac{1}{4}$ per cent. having been allowed on the gross amount of moneys actually collected, a further commission of $1\frac{1}{4}$ per cent. on a sum of \$231,000, consisting of amounts adjusted or set off, was allowed.—*Re Central Bank. Lye's claim*, Chancery Division, March 28, 1892.

Criminal law—Hearing before magistrate—Refusal to admit evidence—Mandamus.

At the hearing of a criminal charge before a magistrate, evidence given before a special committee of the House of Commons and taken down by stenographers, was tendered before the magistrate and refused by him.

Held, that the Court had no power to grant a mandamus to the county judge directing him to receive such evidence.—*Reg. v. Connolly*, Common Pleas Division, Dec. 24, 1891.

SUPERIOR COURT—MONTREAL.

Arrest as a dangerous lunatic—Probable cause—Damages.

Held:—1. That arrest and privation of liberty on the charge of being a dangerous lunatic, although such charge does not involve any moral turpitude, entitles the person so arrested to damages, if the proceedings be taken without reasonable or probable cause.

2. Where an information was laid by the defendant against a person as a dangerous lunatic, without the consent or knowledge of his friends and relatives, and it appeared that the person had always been perfectly harmless, and that defendant's apparent motive was to oust him from the house occupied by him, which belonged to the defendant, it was held that the proceedings were instituted without probable cause, and damages were awarded.—*Genereux v. Murphy*, in Review, Johnson, C.J., Mathieu, Wurtelle, J.J. (Mathieu, J. diss.), May 30, 1891.

Libel by newspaper—Justification—Facts grossly misstated—Costs.

Held:—1. A plea of justification, to an action against a newspaper for libel, cannot be supported, where it appears that the facts were grossly misstated, but without malice, in the article

complained of; as where it was stated that a collision between vehicles was caused by the plaintiff's intoxicated condition, and the proof showed that he was not intoxicated, and not to blame for the collision.

2. In an action for libel, where the plaintiff obtains judgment for part of the amount claimed, he cannot be charged with any part of the costs, unless there has been a tender by the defendant. —*Turgeon v. Wurtele*, in Review, Johnson, C.J., Mathieu, Pagnuelo, J.J., (Mathieu, J., diss. as to costs), May 30, 1891.

Surety—Obligation with a term—Insolvency of principal debtor—Arts. 1933, 1934, C. C.

Held:—That a surety whose obligation is limited to the capital of the debt, is entitled to the benefit of the term stipulated for payment, notwithstanding the insolvency of the principal debtor. —*McCulloch v. Barclay et al.*, de Lorimier, J., June 30, 1891.

INSOLVENT NOTICES.

Quebec Official Gazette, April 2, 9, 16.

Judicial Abandonments.

BLACKSON, Samuel, jeweller, Montreal, April 2.
 CHARLEBOIS, Charles, founder, Lachute, March 31.
 FOURNIER, Jos., printer, Montreal, April 6.
 FRIEDMAN, Nathan, Montreal, April 5.
 GOURDEAU, Hermine, Chicoutimi, doing business as Geo. Delisle & Co., March 28.
 GREGOIRE, Olymphe, Ste. Luce, doing business as Hug. Laberge & Co., March 28.
 GROTHÉ, L. O., Montreal, doing business as L. O. Grothé & Co., March 21.
 LEVI, Raphael, St. John's, April 2.
 METCALFE, R. H., Aubrey, March 3.

Curators Appointed.

BEAUCHAMP, W. H. N.—Bilodeau & Renaud, Montreal, joint curator, April 13.
 BLACKSON, Samuel.—W. A. Caldwell, Montreal, curator, April 16.
 DESCHÊNES, George Honoré, St. Epiphane.—P. Langlais, N.P., Fraserville, curator, April 5.

FRIEDMAN, Nathan.—W. A. Caldwell, Montreal, curator, April 16.
GERMAIN & Co., D. N., Montreal.—Kent & Turcotte, Montreal, joint curator, April 9.
GROTHÉ & Co., L. O.—Kent & Turcotte, Montreal, joint curator, March 30.
LABERGE & Co., Aug., Ste. Luce.—H. A. Bedard, Quebec, curator, April 5.
LAVERGNE, Jos. Elz., Ste. Louise.—H. A. Bedard, Quebec, curator, March 26.
LEMAY, J. N. F., St. Côme.—H. A. Bedard, Quebec, curator, March 21.
LEVI, R., St. John's.—F. W. Radford, Montreal, curator, April 12.
METCALFE, R. H.—L. G. G. Beliveau, Montreal, curator, April 9.
PELLETIER, Joseph, St. Jean Port Joli.—H. A. Bedard, Quebec, curator, March 26.
SOUCY & Co., E., Quebec.—J. A. Turgeon, Quebec, curator, March 14.

Dividends.

ALLARD, J. A., Montreal.—First and final dividend, payable April 21, C. Desmarteau, Montreal, curator.
AUCLAIRE, J. J., Montreal.—First and final dividend, payable April 19, C. Desmarteau, Montreal, curator.
BOIVIN, George, Quebec.—First and final dividend, payable April 19, N. Matte, Quebec, curator.
BOURKE, J. E., St. Jean.—Second & final dividend, payable April 15, Lamarche & Olivier, Montreal, joint curator.
CHAMPOUX, Joseph, Joliette.—First and final dividend, payable April 20, D. Seath and A. Turcotte, Montreal, joint curator.
CLÉMENT, Max., Quebec.—First dividend, payable April 13, D. Arcand, Quebec, curator.
CLÉMENT & Boivin, Quebec.—First dividend, payable April 13, D. Arcand, Quebec, curator.
CRAVEN & Co., W. A., Montreal.—First and final dividend, payable July 2, A. F. Riddell, Montreal, curator.
CUINAT, F. X., Montreal.—First and final dividend, payable April 26, C. Desmarteau, Montreal, curator.
DAOUST, F. X., Montreal.—First and final dividend, payable April 19, C. Desmarteau, Montreal, curator.
FARLEY, Frank, Bulstrode.—First and final dividend, payable May 10, A. Quesnel, Arthabaskaville, curator.
GIROUX & Cie., Jules.—First and final dividend, payable April 28, J. M. Marcotte, Montreal, curator.

- Godbout, F. X.—First and final dividend, payable April 24, P. J. G. Labbé, Quebec, curator.
- Gouin & Gouin, Three Rivers.—Amended dividend, payable April 20, T. E. Normand, Three Rivers, curator.
- Hood, Mann & Co., Montreal.—First and final dividend, payable April 13, W. A. Caldwell, Montreal, curator.
- Hudon, Pierre, Montreal.—First dividend, payable April 18, A. F. Riddell, Montreal, curator.
- Leblanc, John, Carleton.—First and final dividend, payable April 19, H. A. Bedard, Quebec, curator.
- Leblanc, Mary Jane, Carleton.—First and final dividend, payable April 26, H. A. Bedard, Quebec, curator.
- Marceau, Jr., Evariste, Quebec.—First and final dividend, payable April 25, N. Matte, Quebec, curator.
- Martin, A. J.—First dividend, payable April 13, Bilodeau & Renaud, Montreal, joint curator.
- Paquet, Antoine, Quebec.—First and final dividend, payable April 19, H. A. Bedard, Quebec, curator.
- Payne, George.—Dividend, payable April 28, S. C. Fatt, Montreal, curator.
- Piton, Alph., Quebec.—First and final dividend (9½c.), payable April 25, G. Darveau, Quebec, curator.
- Quevillon & Lamoureux.—Second and final dividend, payable May 4, Millier & Griffith, Sherbrooke, joint curator.
- Robertson, Richard.—Dividend, L. P. Le Bel, New Carlisle, curator.
- Stewart, George, Montreal.—Second and final dividend, payable May 3, C. Desmarteau, Montreal, curator.
- Trudeau & Bro., Stanbridge Station.—First and final dividend, payable April 18, E. N. Morgan, Bedford, curator.

THE LAW OF GAMING.—Lord Herschell's bill to amend the law of gaming and wagering under 8 & 9 Vict. c. 109, s. 18, by getting rid of the judge-made law of *Read v. Anderson*, 53 Law J. Rep. Q. B. 532, has passed the House of Commons, and will probably become law. Section 18 of 8 & 9 Vict. c. 109, enacts that all contracts or agreements by way of gaming or wagering shall be null and void, but in *Read v. Anderson* Lord Justice Bowen saw his way to holding that lost bets made by turf commission agents could be recovered by the agents from their principals, notwithstanding the revocation of the authority to pay them. Lord Esher emphatically dissented from this judgment, to which Lord Justice Fry silently assented. Sir James Stephen, both when on the bench and (in the *Nineteenth Century*) after his retirement, pointed out the unsoundness of the judgment, and so did the late Mr. Justice Manisty, in *Cohen v. Kittell*, 58 Law J. Rep. Q. B. 241.—*Law Journal* (London.)

THE LEGAL NEWS.

VOL. XV.

MAY 16, 1892.

No. 10.

CURRENT TOPICS AND CASES.

The case of *Scott & McCaffrey*, decided by the Court of Queen's Bench, Montreal, March 26, will, it may be hoped, establish a useful check on the multiplication of actions of damages. In this case three actions of damages were instituted, based on three seizures made by a creditor in ordinary course, for the collection of a judgment. These seizures were technically irregular, and the creditor, being unsuccessful, had to pay the costs incurred. But the debtor was not content with this, and instituted three actions of damages. There was no malice, and moreover no damage was proved; but the first Court gave nominal damages in each case. The Court of appeal set these judgments aside, holding that the responsibility of a person who comes before the Court in the exercise of a right is limited to the ordinary penalty of the unsuccessful pleader, that is to say, the payment of the costs of the proceedings. This rule applies not only to ordinary actions, but to the rigorous proceedings which creditors may adopt for the protection of their rights, such as execution, *capias*, etc., provided there be probable cause and absence of malice.

The Criminal Law Bill, 1892, now under discussion before the House of Commons, is a very comprehensive

measure, but it does not comprise one offence which might be visited with punishment, and that is the suggestion of amendments to Codes without reasonable grounds. With all their good points, Codes have two drawbacks. First, they unsettle all references to decisions under the law as it previously existed, and necessitate tedious comparing of the old statutes with the new. Recently, we heard a contention strongly urged on the part of a prisoner, and the Crown replied that the point was already settled by a decision. The answer to this was that the law had been changed by the Revised Statutes. Thereupon a reference and comparison became necessary, and, after some time had been expended, it was found that the section under which the case cited had been decided was left intact, but in a different place. The second objection to Codes is that they seem to invite and attract innovators to pull down and destroy what has just been laboriously built up. We have already three Codes, the Civil Code, the Code of Procedure and the Municipal Code, which afford an annual exercise for the powers of these gentlemen, and the Criminal Code now under consideration threatens to add another to the list, unless such destructiveness can be prohibited,—say under Title iv, “offences against public convenience.”

The death of Lord Bramwell is mentioned in a cable despatch of May 9. The deceased was one of the oldest and most distinguished of English judges. Born in 1808, and called to the bar in 1838, he was elevated to the bench in 1856, succeeding Baron Parke in the Court of Exchequer. In 1881 he retired from the Court of Appeal and was raised to the peerage. Lord Bramwell was racy and original in his style, and always a great favourite with the bar.

NEW PUBLICATIONS.

BILLS, NOTES AND CHEQUES:—The Bills of Exchange Act, 1890, and the Amending Act of 1891. By Mr. J. J. Maclaren, Q.C., D.C.L., LL.D.—Publishers: The Carswell Co. (Ltd.), Toronto.

This is a work which was to have appeared earlier, but Mr. Maclaren having discovered certain inconsistencies and imperfections in the Act, submitted suggestions to the Minister of Justice, which were approved and embodied in the amending Act of 1891, and the present work was delayed in order that the amendments might be inserted in their proper places.

The previous works on the Act appeared with such rapidity that small opportunity was afforded for elaboration, and in taking up the present treatise the reader will naturally look for a more careful and methodical treatment of the subject. In this expectation we have reason to believe that he will not be disappointed. The arrangement seems to be as perfect as can be devised. The text of the Act is followed by explanatory paragraphs, with citations of cases, and these, again, by illustrations derived from the reports. Two thousand three hundred decisions are cited, besides nearly a thousand illustrations. As an example of the care which has been bestowed by the author, it may be mentioned that in every instance the year in which the case was decided is given within parentheses, and each group of cases is arranged in chronological order beginning with the oldest. The Canadian cases, of which nine hundred and fifty are cited, have been subdivided by provinces. The decisions cited are also brought down to January last. From the examination which we have been able to make of the work we believe it is worthy of the high reputation of the author, and that the profession will find in it a commentary which will fully satisfy their requirements.

THE LAW OF SALES:—Commentaries on the Law of Sales and collateral subjects; by Mr. Jeremiah Travis, LL.B., recently a judge of the Northwest territories, etc. Boston, Little, Brown & Co.; Toronto, The Carswell Co. (Ltd.), Publishers.

The first glance at this work shows that it is at all events one of considerable originality, as well as the result of an elaborate examination of the subject. Mr. Travis is already known as the author of a treatise on Canadian Constitutional Law (see vol. vii, Legal News, p. 234) which evinced a mind not disposed to acquiesce in statements of law simply because they emanate from the highest authority. The present work affords a good many opportunities for similar assertion of individual opinion, or as Mr. Travis calls it, "exposure of the most transparent fallacies." "The one object I have had in view in my work," he says, "is to state the law as it actually is; and where I have found unsound decisions, as I have done in every branch of the law, I have not hesitated to point them out, and to show, with all the distinctness and conclusiveness in my power, that they are not well-decided, and are not law." The text-writer here assumes a lofty function, in essaying to free the true principle from the incrustation of judicial error. Opinions may vary, however, as to how far it is within the compass of one mind to do this, and how far the author has justified the assumption of quasi-infallibility. It may be added that while the two volumes now issued are complete within their limits, the author expresses the hope that he may be able to issue hereafter two additional volumes, covering other questions connected with the law of sales, which he has left over for later consideration and discussion.

EXCHEQUER COURT REPORTS, No. 4, of vol. 2, contains all the important decisions respecting patents and trademarks of the department of agriculture since the year 1869.

The Law Library (Milwaukee, Wis.), is a new monthly publication, containing a review of legal literature.

The *Monthly Law Digest*, edited by Mr. F. L. Snow (Montreal, A. Periard), furnishes a digest of current decisions.

SUPREME COURT OF CANADA.

OTTAWA, April 4, 1892.

Quebec.]

BLACHFORD v. McBAIN.

Lessor and lessee—Amount claimed—Arts. 887 and 888 C.P.C.—Jurisdiction.

Held, affirming the judgment of the Court below, (M. L. R., 6 Q.B. 273), where in an action brought by the lessor under arts. 887 and 888, C.P.C., to recover possession of the premises, a demand of \$46 is joined for the value and occupation since the expiration of the lease, such action must be brought in the Circuit Court, the amount claimed being under \$100, Fournier, J., dissenting.

Appeal dismissed with costs.

Duclos for appellant.*Archibald, Q.C.*, for respondent.

April 4, 1892.

Quebec.]

THE QUEEN v. MARTIN.

Negligence of servant—Crown—Liability of—50-51 Vic. ch. 16—Prescription—Arts. 2262, 2267, 2188, 2211, C. C.

Held, reversing the judgment of the Exchequer Court; even assuming 50-51 Vic. ch. 16 gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty, (upon which point the Court expresses no opinion) such act is not retroactive in its effect and cannot be relied on for injuries received prior to the passing of the Act.

Held also, even assuming that under the common law of the Province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable, the injury complained of

having been received more than a year before the filing of the petition, the right of action was prescribed.

Appeal allowed without costs.

Robinson, Q.C., and Hogg, Q.C., for appellant.

Belcourt & Taché, for respondent.

Quebec.]

BELL TELEPHONE CO. v. CITY OF QUEBEC.

QUEBEC GAS CO. v. CITY OF QUEBEC.

Appeal—Action to set aside municipal by-law—Supreme and Exchequer Courts Act, sect. 24 (G.)

In virtue of a by-law passed at a meeting of the council of the corporation of the City of Quebec in the absence of the Mayor, but presided over by a councillor elected to the chair in the absence of the Mayor, an annual tax of \$800 was imposed on the Bell Telephone Company of Canada, (appellant) and a tax of \$1000 on the Quebec Gas Company. In actions instituted by the appellants for the purpose of annulling the by-law, the Court of Queen's Bench for Lower Canada (Appeal side) reversed the judgment of the Superior Court, and dismissed the actions, holding the tax valid.

On appeal to the Supreme Court of Canada :

Held, that the cases were not appealable, the appellants not having taken out or been refused, after argument, a rule or order quashing the by-law in question within the terms of sec. 24 (g) of the Supreme and Exchequer Courts Act, providing for appeals in cases of Municipal by-laws. *Varenes v. Verchères* (19 Can. S. C. R. 365), *Sherbrooke v. McManamy*, (18 Can. S. C. R. 594) followed.

Appeals quashed without costs.

Irvine, Q.C., and Stuart, Q.C., for appellants.

P. Pelletier, Q.C., for respondent.

April 4, 1892.

Quebec.]

ACCIDENT INSURANCE CO. OF NORTH AMERICA v. YOUNG.

Accident Insurance—Immediate notice of death—Waiver—External injuries producing erysipelas—Proximate or sole cause of death.

An accident policy issued by the appellants was payable in case, *inter alia*, the bodily injuries alone shall have occasioned

death within ninety days from the happening thereof, and provided that "the insurance should not extend to hernia, &c., nor "to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may "have been caused wholly or in part by bodily infirmities or "disease, existing prior or subsequent to the date of this contract, "or by the taking of poison, or by any surgical operation or "medical or mechanical treatment, nor to any case except where "the injury aforesaid is the proximate or sole cause of the disability or death."

The policy also provided that "in the event of any accident or injury for which claim may be made under this policy immediate notice must be given in writing, addressed to the manager of this company at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice shall invalidate all claims under this policy."

On the 21st March, 1886, the insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued on the 13th of April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on the 29th April, and the notice was only received at Montreal on the 1st of May. The manager of the company acknowledged receipts of proofs of death, which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognise their liability. At the trial there was some conflicting evidence as to whether the erysipelas resulted solely from the wound, but the Court found on the facts that the erysipelas followed as a direct result from the external injury. On appeal to the Supreme Court:

Held, reversing the judgment of the Court below, Fournier and Patterson, JJ., dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this respect.

Per Fournier and Patterson, JJ., affirming the judgment of

the Court below, that the external injury was the proximate or sole cause of death within the meaning of the policy.

Appeal allowed with costs.

Geoffrion, Q.C., and Cross, for appellants.

Laflour, for respondent.

April 4, 1892.

Ontario.]

NORTH PERTH ELECTION APPEAL.

CAMPBELL V. GRIEVE.

Dominion Controverted Elections Act—Appeal—Evidence—Reversal—Loan for travelling expenses—Proof of corrupt intent—40 Vic. ch. 3, secs. 88, 91; sec. 84 (a)—(e)—Executory contract, sec. 131—Free Railway tickets.

G., a voter and supporter of the respondent, holding a free railway ticket to go to Listowel to vote and wanting two dollars for his expenses while away from home, asked for the loan of the money from W., a bar tender and a friend. W. not having the money at the time, applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G. to enable him to go to Listowel to vote. S. the agent, lent the money to W. who handed it over to G. W. returned the two dollars to S. the day before the trial. The judges at the election trial held that it was a *bona fide* loan by S. to W. On appeal to the Supreme Court of Canada:

Held, reversing the judgment of the Court below, that as the decision of the Court below depended on the inferences drawn from the evidence, their decision could be reversed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colorable transaction by S. to pay the travelling expenses of G. within the provisions of sec. 88 of the Dominion Elections Act, and a corrupt practice sufficient to avoid the election under sec. 91 of the said Act.

Strong, J., dissenting, was of opinion that there was no evidence that the loan of \$2 was made to G. with the corrupt intent of inducing him to vote for the respondent.

Patterson, J., dissented on the ground that as the decision of the Court below depended on the credibility of the witnesses it ought not to be interfered with.

Held also, *per* Strong and Patterson, JJ., affirming the judg-

ment of the Court below, that upon the evidence which is reviewed in the judgments, the G. T. Railway tickets issued at Toronto and Stratford for the transportation of voters by rail to the polls in this case were free tickets, and that as the free tickets had been given to voters who were well known supporters of the respondent, prepared to vote for him and for him alone if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of sec. 88 of the Dominion Elections Act. *Berthier Election* case, 2 Can. S.C.R. 102, followed.

Per Strong, J. That the tickets issued by the G.T.R. having been furnished with notice that they were to be used as they were in fact, the price thereof could not have been recovered at law. Sec. 131 Dominion Elections Act.

Appeal allowed with costs.

Osler, Q.C., and *Ferguson*, for appellant.

Garrow, Q.C., for respondent.

April 4, 1892.

Ontario.]

WELLAND ELECTION APPEAL.

GERMAN V. ROTHERY.

Election—Promise to procure employment by candidate—Finding of the trial Judges—49 Vic. ch. 8, sec. 84 (b).

On a charge by the petitioner that the appellant had been guilty personally of a corrupt practice by promising to a voter W. to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial judges held on the evidence that the charge had been proved.

The promise was charged as having been made in the township of Thorold on the 28th February, 1891. The evidence of W., who some time before the trial made a declaration upon which the charge was based at the instance of the solicitor for the petitioner, and had got for such declaration employment in Montreal from the C. P. R. Co. until the trial took place, was principally relied on in support of the charge, and the promise was found by the Court to have been made on the 17th February. Moreover G., the appellant, although denying the charge, admitted in his examination that he intimated to the voter that he would assist him, and there was evidence that after the elections, he wrote to W. and procured him the situation, but the letter

was not put in evidence, having been destroyed by W. at the request of the appellant.

Held, affirming the judgment of the Court below, that the evidence of W. being in part corroborated by the evidence of the appellant, the conclusion arrived at by the trial judges was not wrong, still less so entirely erroneous as to justify this Court as an appellate tribunal, in reversing the decision of the Court below on the questions of fact involved.

Appeal dismissed with costs.

W. Cassels, Q.C., for appellant.

Blackstock, Q.C., for respondent.

April 4, 1892.

Ontario.]

BARTON V. McMILLAN.

Contract—Deed of land—Evidence—Agency—Statute of frauds—Parol testimony.

M. owned certain property which was mortgaged and had been advertised for sale under a power of sale in the mortgage. Before the date fixed for the sale M. had made an assignment for the benefit of his creditors, and his wife tried to purchase the property. It was not sold on the day named, and the next day M's wife went to the solicitors of the mortgagee and arranged for the purchase by making a cash payment and giving a mortgage for the balance. She had some other property on which she wished to raise the money for the cash payment, and B. offered to lend the amount at 7 p.c. interest for a year, he taking the wife's property and holding it in trust for that time. B. and M. went to the office of the mortgagee's solicitors where a contract was drawn up in the terms agreed and signed by B. who told the solicitor that he did not know whether the deed would be taken in his own name or his daughter's, but that he would advise him by telephone. On the following day a telephone message came to the solicitors to have the deed made in the name of his daughter which was done; the deed was executed, the money was paid, and a mortgage was given to the original mortgagee as agreed. Subsequently the daughter claimed that she purchased the property absolutely for her own benefit, and an action was brought by M's wife against B. and his daughter to have the daughter declared a trustee of the property subject to repayment of the loan from B. and for specific performance of the agreement with B., the action charging collusion and con-

spiracy on the part of B. and his daughter to deprive plaintiff of her property. The defendant pleaded the statute of frauds in addition to denying the alleged agreement.

Held, affirming the decision of the Court of Appeal and that of the trial judge, Strong, J. dissenting, that the evidence established the agreement by B. to lend the money and take the property in trust as security; that the daughter was aware of this agreement; and that the deeds executed having been made in pursuance thereof, the daughter must be held a trustee of the property as B. would have been if the deed had been taken in his name.

Held, further, Strong, J., dissenting, that the statute of frauds did not prevent the said agreement being enforced notwithstanding it was not in writing.

Appeal dismissed with costs.

Moss, Q.C., for the appellants.

Bain, Q.C., for respondent.

April 4, 1892.

Nova Scotia.]

MILLER V. DUGGAN.

Registry Act—R.S.N.S. 5th ser. c. 84 s. 21—Registered judgment—Priority—Mortgage—Rectification of mistake.

By R.S.N.S., 5th Ser., c. 84 s. 21 it is provided that "a judgment duly recovered and docketed shall bind the lands of the party against whom the judgment shall have passed, from and after the registry thereof in the County or district wherein the lands are situate, as effectually as a mortgage whether such lands shall have been acquired before or after the registering of such judgment; and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor, who shall first register his judgment."

D. had agreed to mortgage certain properties, one of which had been conveyed to her late husband, through whom she claimed, by four different deeds, three conveying a one-sixth interest each and the fourth a half interest. The conveyancer who prepared the mortgage had before him one of the deeds conveying a one-sixth interest, and by mistake and inadvertence that interest instead of the whole was described and conveyed. On Dec. 3rd, 1887, the property mortgaged was sold under foreclosure and conveyed by the Sheriff to M. On the 27th September, 1887,

a judgment was recovered and registered against D., and in July, 1889, an execution was issued on said judgment under which the sheriff attempted to levy on the five-sixths of the property of D. which should have been included in the mortgage. In an action to have the mortgage rectified and the judgment creditor restrained from levying upon and selling the said property :

Held, affirming the judgment of the Supreme Court of Nova Scotia, Strong and Patterson, JJ., dissenting, that the parol agreement by D. to give a mortgage of the five-sixth parts of the said property was void against the registered judgment, and the action could not be maintained. *Grindley v. Blaikie*, 19 N.S. Rep. 27, approved and followed.

Appeal dismissed with costs.

Borden, Q.C., for the appellants.

Ross, Q.C., for the respondents.

April 4, 1892.

Ontario.]

McDONALD v. McDONALD.

Title to land—Action against estate for debt of executor—Purchase by executor at sale under execution—Constructive Trust—Statute of Limitations.

D. M. was one of the executors of his father's estate and an action was brought against the estate on a note made by him, which his father, in his lifetime, had endorsed for his accommodation. Judgment was recovered in said action and an execution issued under which land devised to A. M., a brother of D. M., was sold and purchased by D. M., who gave a mortgage to the judgment creditors. D. M. afterwards sold the land to another brother, W. M., who paid off the mortgage, and it having been offered for sale under execution issued on a judgment against W. M. it was again purchased by D. M. The original devisee of the land A. M., took forcible possession, and D. M. brought an action to recover possession.

Held, affirming the decision of the Court of Appeal (17 Ont. App. R. 192) and of the Divisional Court, Strong, J., dissenting, that the land having been sold in the first instance for a debt of D. M., he became, when he purchased it at such sale, a constructive trustee for the devisee, and this trust continued when he purchased it the second time.

Held, further, that if D. M. was in a position to claim the bene-

fit of the Statute of Limitations there was not sufficient evidence of possession to give him a title thereunder.

Appeal dismissed with costs.

McCarthy, Q.C., and Leitch, Q.C., for the appellant.

Moss, Q.C., for the respondent.

April 4, 1892.

Ontario.]

HOUGHTON v. BELL.

Will—Construction—Devise to children and their issue—Estate to be "equally" divided—Per stirpes or per capita—Statute of Limitations—Possession—Trustee.

T.B. by his will made provision for the support of his wife and unmarried daughters, and then directed as follows: "When my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors, to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto." The testator's wife and unmarried daughters having died, and some of his sons having previously died, leaving children, proceedings were taken to have the intention of the testator under the above clause ascertained.

Held, reversing the judgment of the Court of Appeal (18 Ont. App. R. 25) and restoring that of the trial judge, Ritchie, C. J., dissenting, that the distribution should be *per capita* and not *per stirpes*.

J.B., a son of the testator and one of the executors and trustees named in the will, was a minor when the testator died, and after coming of age he did not apply for probate though leave was reserved for him to do so. He did not disclaim, however, and he knew of the will. With the consent of the acting trustee he went into possession of a farm belonging to the estate some time after he had attained his majority, and had remained in possession for over twenty years when the period of distribution under the clause above set out arrived, and he then claimed to have acquired a title under the Statute of Limitations.

Held, affirming the decision of the Court of Appeal, that as he

held by an express trust under the terms of the will the rights of the other devisees could not be barred by the Statute.

Appeal allowed with costs and cross appeal dismissed with costs.

S. H. Blake, Q.C., for the appellants.

McCarthy, Q.C., and *S. H. Osler*, for the respondents.

Ontario.]

April 4, 1892.

G. T. RY. v. SIBBALD.

G. T. RY. v. TREMAYNE.

Railway Co—Negligence—Construction of road—Interference with highway—Neglect to ring bell.

The Midland Railway Co. in building a portion of its road left at a crossing the road bed some feet below the level of the highway and operated it without erecting a fence or otherwise guarding against accident at such crossing. The road was afterwards operated by the G. T. Ry. Co., and S. was driving along the road one day and as he approached the crossing an engine and tender came towards him on the track; the horses became frightened and broke away from the coachman who had jumped out to hold them, wheeled round and the waggon rolled over the edge of the highway on to the track in front of the train. S. lost his arm, and a lady who had been in the carriage with him was killed. In actions by S. and the administrators of the deceased lady, the jury found that the bell had not been rung as required by the statute, and that the defendant company was guilty of negligence thereby, and also in not fencing, or otherwise protecting, the dangerous part of the highway.

Held, affirming the decision of the Court of Appeals (18 Ont. App. R. 184) and of the Divisional Court (19 O.R. 164) that the Midland Ry. Co. had no authority to construct the road as they did unless upon the express condition that the highway should be restored so as not to impair its usefulness, and it or any other company operating the road was liable for injury resulting from the dangerous condition of the highway to persons lawfully using it.

Held further, that the bell not having been rung as the statute required, the company was liable for injuries caused by the horse taking fright and overturning the waggon so that the occupants were thrown on to the track though the engine and the waggon did not come in contact. *G. R. Ry. Co. v. Rosenberger* (9 Can. S. C. R. 311) followed.

Appeals dismissed with costs.

McCarthy, Q.C., for the appellants.

Burns, for the respondents.

*INSOLVENT NOTICES.**Quebec Official Gazette, April 23, 30 & May 7.**Judicial Abandonments.*

- BENOIT, William, parish of St. J. Bte. de Rouville, April 20.
CHAPMAN & Drysdale, manufacturers, Lachute, April 30.
FORTIER, Philadelphie, St. Charles, Bellechasse, April 20.
KINSELLA, Miss Aurelia, dressmaker, Lévis, April 19.
LUNAN, William J. (Wm. Lunan & Son), grocer, Sorel, April 11.
MUNROE, Thomas B., Bury (or Robinson), general merchant, April 19.
WILLOUGHBY Bros., contractors, Montreal, April 26.

Curators Appointed.

- BEDARD, Henry F., Hull.—Wm. Grier, Montreal, curator, April 19.
BIRON, Antoine B.—Millier & Griffith, Sherbrooke, joint curator, April 26.
CHARLEBOIS, Charles, Lachute.—G. J. Walker, Lachute, curator, April 11.
CREVIER, F. X. (absentee).—Bilodeau & Renaud, Montreal, joint curator, April 19.
DELISLE & Cie., Geo., Chicoutimi.—H. A. Bedard, Quebec, curator, April 14.
DUCHENE, Ovide, St. Jovite.—A. Lamarche, Montreal, curator, April 19.
FOURNIER, Jos., printer, Montreal.—C. Desmarteau, Montreal, curator, April 16.
KINSELLA, Amelia, dressmaker, Lévis.—G. H. Burroughs, Quebec, curator, May 3.
LUNAN, William J., Sorel.—John Hyde, Montreal, curator, April 19.
MUNRO, Thomas B., Bury.—J. McD. Hains, Montreal, curator, May 2.
NEILSON & Co., A. N., St. Gabriel.—E. T. Nesbitt, Quebec, curator, April 22.
PARÉ, J. D., Montréal.—Lamarche & Olivier, Montreal, joint curator, April 27.
PRINCE, E. C., St. Grégoire.—F. Valentine, Three Rivers, curator, April 19.
ROY, P. E., Coaticook.—Royer & Burrage, Sherbrooke, joint curator, April 11, claims to be filed with Kent & Turcotte, Montreal.

SMITH, Chas. A. (Montreal Cigar Association).—C. Desmarteau, Montreal, curator, May 3.

VINCELETTE, Alfred, St. Léonard.—Lamarche & Olivier, Montreal, joint curator, April 19.

Dividends.

BECK, Martin.—First and final dividend (11c.), payable May 10, D. Williamson, Montreal, curator.

BISSON, H. & J.—First and final dividend, payable May 19, A. Lemieux, Levis, curator.

BLONDEAU & Gravel.—First dividend, (10c.), payable May 16, N. Fortier, Quebec, curator.

CADIEUX, Joseph, Montreal.—First dividend, on privileged claims only, payable May 21, D. Parizeau, Montreal, curator.

CAMPBELL & Ferguson, Sherbrooke.—First and final dividend, payable May 16, J. McD. Hains, Montreal, curator.

CARDINAL, Félix, St. Stanislas.—First dividend, payable May 18, Kent & Turcotte, Montreal, joint curator.

CRAVEN & Co., W. A., Montreal.—First and final dividend, payable May 2, A. F. Riddell, Montreal, curator.

DEMERS, J. Bte., Ste. Julie de Somerset.—First and final dividend, payable May 16, N. Matte, Quebec, curator.

DESPAROIS, Paul Ephrem, Valleyfield.—First dividend, payable May 18, Kent & Turcotte, Montreal, joint curator.

GALIBOIS, F. X.—First dividend, payable May 16, S. A. Pergevin, Quebec, curator.

LABBÉ & Co., Jos., Quebec.—First and final dividend, payable May 9, N. Matte, Quebec, curator.

LABORERS' Syndicate, furniture dealers, Montreal.—First and final dividend, payable May 19, C. Desmarteau, Montreal, curator.

LAFORTUNE, Napoléon, Montreal.—First dividend, payable May 18, Kent & Turcotte, Montreal, joint curator.

LANGLOIS & Langlois, Quebec.—First and final dividend, payable May 23, D. Arcand, Quebec, curator.

LEMAITRE, A. H., Thetford Mines.—First and final dividend, payable May 17, H. A. Bédard, Quebec, curator.

LOUGHMAN & O'Flaherty, Montreal.—First dividend, payable May 18, Kent & Turcotte, Montreal, joint curator.

MARROTTE, Samuel, Montreal.—First dividend, payable May 18, Kent & Turcotte, Montreal, joint curator.

PELLETIER & Co., F. P.—First and final dividend, payable May 9, Royer & Burrage, Sherbrooke, joint curator.

ST. LAURENT, F. A., Quebec.—First and final dividend, payable April 9, G. H. Burroughs, Quebec, curator.

TÉTREAUULT, Nap.—Second and final dividend, payable May 17, C. Desmarteau, Montreal, curator.

THE LEGAL NEWS.

VOL. XV.

JUNE 1, 1892.

No. 11.

CURRENT TOPICS AND CASES.

Birthday honors included knighthoods to three members of the legal profession in Canada, of whom two are or were of the Montreal bar. First, as was generally anticipated, the Hon. Alex. Lacoste, the newly appointed Chief Justice of the Court of Queen's Bench in this province, receives the honor which was conferred upon his predecessors Sir L. H. Lafontaine and Sir A. A. Dorion. The successor of Sir John A. Macdonald in the office of premier of Canada, the Hon. J. J. C. Abbott, is an old and distinguished member of the Montreal bar, who was solicitor general for Lower Canada thirty years ago, and it was a matter of course that an honor already conferred upon several members of his cabinet should be offered to him. The third on the list, the Hon. Oliver Mowat, has been premier of Ontario for twenty years, the longest term of provincial administration to be found in the annals of Confederation. Mr. Mowat took the unusual step of quitting the bench to assume the duties of a political leader, but his great success in the office which he has so long retained appears to have justified the wisdom of his option. These preferments are all beyond cavil, the men who have received them lending additional distinction to the title.

Daveluy & La Société Canadienne Française de Construction, noted in the present issue, is an interesting and rather peculiar case. Mr. Justice Davidson rendered the original judgment. This was reversed in appeal by Justices Cross, Baby, Bossé and M. Doherty; but the first judgment has been restored by the Supreme Court, two judges dissenting. The view which prevails has received the support of five judges, while the contrary opinion has the support of six judges. If the contract between the society and its shareholder be considered in the nature of a pledge of the shares for what was due to the society, a somewhat analogous case may be put thus: A. pledges his watch to B., a pawnbroker. Afterwards A., with the aid and connivance of B.'s employee, gets the watch back into his hands, and pledges it to C. When B. hears of this he goes to C., and by paying him the amount advanced by him to A. gets the watch again into his hands, and holds it under the original contract for the amount of A.'s indebtedness to him. But A. in the meantime has become insolvent, and his curator pretends that he is entitled to the watch on payment of the amount advanced on it by C. The first Court held that A.'s insolvency before the discovery of the fraud ought not to affect the case, for A.'s creditors are not entitled to profit by his fraud, as they obviously would do if the curator had a right to get the thing pledged as part of the assets of the insolvent without paying B.'s claim. In the *Daveluy* case the Court of Queen's Bench considered the transfer of the shares by P., countersigned by the secretary, as regular and complete. It was no doubt regular on its face, and valid as regards an innocent third party; but as between P. and the society it was none the less a fraud, and his creditors should not profit by it. The final decision certainly meets the equity of the case, and we are disposed to think that it is the more satisfactory solution of the difficulty.

A deceased judge of the Superior Court once expressed

a fear that, so bad was most of the ink in use, the records of the Court House would fade away before long and become illegible. The *Paper World* attacks modern records on the score of the material itself as well as of the ink employed. Experts, it says, are predicting that the books of to-day will fall to pieces before the middle of the coming century. The paper in the books that have survived two or three centuries was made by hand, of honest rags, and without the use of strong chemicals, while the ink was made of nut galls. To-day much of the paper for books is made, at least in part, of wood pulp, treated with powerful acids, while the ink is a compound of various substances naturally at war with the flimsy paper upon which it is laid. The printing of two centuries ago has improved with age; that of to-day, it is feared, will, within fifty years, have eaten its way through the pages upon which it is impressed.

Mixed juries are in use in New Zealand. This is comparatively a new colony, but it has prospered wonderfully, and has a population of 650,000 whites. Although the native population of 100,000 fifty years ago has decreased to 40,000, the Maori element is now taking a far higher place than the Indian in Canada. The Maoris have four members of their own race in each of the two Houses of Parliament, and it is said that they occupy more than their fair share of the debates, as they are orators born. Maori magistrates sit on the bench with the European judges to determine questions of native title, and Maoris charged with crime are tried by a semi-Maori jury.

SUPREME COURT OF CANADA.

April 4, 1892.

LACOSTE v. WILSON.

Quebec.]

*Donation inter vivos—Subsequent deed—Giving in payment—
Registration—Arts. 806, 1592, C. C.*

The parties to a gift *inter vivos* of certain real estate with warranty by the donor, did not register it, but by a subsequent deed which was registered changed its nature from an apparently gratuitous donation to a deed of giving in payment.

In an action brought by the testamentary executors of the donor to set aside the donation for want of registration,

Held, affirming the judgment of the Court below, M. L. R., 6 S. C. 316, that the forfeiture under art. 806, C. C., resulting from neglect to register applies only to gratuitous donations, and as the deed in this case was in effect the giving of a thing in payment (*dation en paiement*) with warranty, which under article 1592, C. C., is equivalent to sale, the testamentary executors of the donor had no right of action against the donee based on the absence of registration of the original deed of gift *inter vivos*.

Appeal dismissed with costs.

Lajoie for appellant.

Geoffrion, Q.C., for respondent.

BALL v. McCaffrey.

Quebec.]

*Appeal—Acquiescence in judgment—Jurisdiction—36 Vict., ch. 81,
P. Q.—Charges for boomage—Agreements—Renunciation to
rights—Estoppel by conduct—Renonciation tacite.*

In an action in which the constitutionality of 36 Vic., c. 81 (P. Q.), was raised by the defendant the Attorney General for the province intervened, and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney General's intervention, the defendant appealed to the Court of Queen's Bench (appeal side), but pending the appeal, acquiesced in the judgment of the Superior Court on the intervention and discontinued his appeal from that judgment. On a further appeal to the Supreme Court of Canada from the judgment of the Court of

Queen's Bench on the principal action, the defendant claimed he had the right to have the judgment of the Superior Court on the intervention reviewed.

Held, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned, the judgment on the intervention of the Attorney General could not be the subject of an appeal to this Court.

F. Mc. brought an action against G. B. for \$4,464 as due to him for charges which he was authorised to collect under 36 Vic., ch. 81, P. Q., for the use by G. B. of certain booms in the Nicolet river during the years 1887 and 1888. G. B. pleaded that under certain contracts entered into between F. Mc. and G. B. and his *auteurs*, and the interpretation put upon them by F. Mc., the repairs to the booms were to be and were in fact made by him and that in consideration thereof he was to be allowed to pass his logs free; and also pleaded compensation of a sum of \$9,620 for use by F. Mc. of other booms and repairs made by G. B. on F. Mc. C's booms and which by law he was bound to make.

Held, reversing the judgment of the Court below, that as there was evidence that F. Mc. had led G. B. to believe that under the contracts he was to have the use of the booms free in consideration for the repairs made by him to the piers, &c., F. Mc. was estopped by conduct from claiming the dues he might otherwise have been authorised to collect.

Held, further that even if F. Mc.'s right of action was authorised by the Statute the amount claimed was fully compensated by the amount expended in repairs for him by G. B.

Appeal allowed with costs.

Laflamme, Q.C., and *Charbonneau* for appellant.

Honan for respondent.

Brodeur for the Attorney General.

GRANT v. THE QUEEN.

Quebec.]

Petition of right (P. Q.)—R. S. C. Art. 5976—Sale of timber limits—Licenses—Plan—Description—Damages—Art. 992, C. C.

Where the holder of a timber license does not verify the correctness of the official description of the lands to be covered by the license before the issue of the license, and after its issue works on lands and makes improvements on a branch of a river

which he believed formed part of his limits but are consequently ascertained by survey to form part of adjoining limits, he cannot recover from the Crown for losses sustained by acting on an understanding derived from a plan furnished by the Crown prior to the sale. Fournier, J., dissenting.

Patterson, J., was of opinion that the appellant's remedy should have been by action to cancel license under Art. 992, C. C., and with a claim for compensation for moneys expended.

Appeal dismissed with costs.

Hutchinson, Q.C., for appellant.

Bedard for respondent.

LA SOCIÉTÉ CANADIENNE FRANÇAISE *v.* DAVELUY.

Quebec.]

Acquiescence in judgment—Attorney ad litem—Right of appeal—Building Society—C. S. L. C., ch. 69—By-laws—Transfer of shares—Pledge—Art. 1970, C. C.—Insolvent—Creditor's right of action—Art. 1981, C. C.

By a judgment of the Court of Queen's Bench the defendant society was ordered to deliver up a certain number of its shares upon payment of a certain sum. Before the time for appealing expired, the attorney *ad litem* for the defendant delivered the shares to the plaintiffs' attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before the plaintiffs' attorney complied with the terms of the offer. On a motion to quash the appeal on the ground of acquiescence in the judgment,

Held, that the appeal would lie.

Per Taschereau, J., that an attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken.

A by-law of a Building Society (appellants) required that a shareholder should have satisfied all his obligations to the society before he should be at liberty to transfer his shares. One P., a director, in contravention of the by-law, induced the secretary to countersign a transfer of his shares to the Banque Villo-Marie as collateral security for an amount he borrowed from the bank, and it was not till P's abandonment or assignment for the benefit of his creditors that the other directors knew of the transfer to the bank, although at the time of his assignment P. was indebted

to the appellant society in a sum of \$3,744, for which amount under the by-law his shares were charged as between P. and the society. The society immediately paid the bank the amount due by P. and took an assignment of the shares of P's debt. The shares being worth more than the amount due to the bank, the curator to the insolvent estate of P. brought an action, claiming the shares as forming part of the insolvent's estate, and with the action tendered the amount due by P. to the bank. The society claimed the shares were pledged to them for the whole amount of P's indebtedness to them under the by-laws.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), and restoring the judgment of the Superior Court, that the payment by the society of the bank's claim annulled and cancelled the transfer made by P. in fraud of the company's rights, and that the shares in question must be held as having always been charged under the by-laws with the amount of P's indebtedness to the society, and that his creditors had only the same rights in respect of these shares as P. himself had when he made the abandonment of his property, viz., to get the shares upon payment of P's indebtedness to the society. Fournier and Taschereau, JJ., dissenting.

Appeal allowed with costs.

Laflamme, Q.C., and *Charpentier* for appellants.

Béique, Q.C., for respondent.

Exchequer Court.]

BURROUGHS v. THE QUEEN.

Salaries of license inspectors—Approval by governor-general in council—Liquor License Act, 1883, s. 6.

On a claim brought by the Board of License Commissioners appointed under the Liquor License Act, 1883, for monies paid out by them to license inspectors with the approval of the department of inland revenue, but which were found to be in excess of the salaries which two years later were fixed by order in council under sec. 6 of the said Liquor License Act, 1883.

Held, affirming the judgment of the Exchequer Court, that the Crown could not be held liable for any sum in excess of the salary

fixed and approved of by the governor-general in council. The Liquor License Act, 1883, s. 6.

Appeal dismissed without costs.

L. H. Burroughs for appellant.

Hogg, Q.C., for respondent.

British Columbia.]

HOGGAN v. THE ESQUIMAULT & NANAIMO RAILWAY CO.

WADDINGTON v. THE ESQUIMAULT & NANAIMO RAILWAY CO.

Government lands—Pre-emption—Statutory right to—Lands reserved.

By 47 Vic., c. 14 (B. C.), "The Settlement Act," certain lands in the province previously withdrawn from settlement, purchase or pre-emption, were thrown open to settlers, and it was provided that for four years from the date of the Act, "they should be open to" actual settlers for agricultural purposes" at the rate of \$1 per acre, except coal and timber lands which were expressly reserved. A part of these lands, which had been reserved for a town site many years previously, had been granted to the defendant company as part consideration for the construction by them of a railway from Esquimalt to Nanaimo. H. & Co. claiming that the statute entitled them to a conveyance of these lands from the company, applied under the pre-emption Act for registration of lots of 160 acres each, which was refused and the refusal was confirmed by the chief commissioner. No appeal was taken to the Supreme Court as the act allows, but suits were brought against the company by each applicant for a declaration of his right to purchase said lands upon payment of said price of \$1 per acre therefor.

Held, affirming the decision of the Supreme Court of British Columbia, that the Settlement Act did not operate to open for settlement lands reserved as these were for a town site; and that the applicants had never entered thereupon as actual settlers for agricultural purposes, but had express notice when they entered that they were not open for settlement as agricultural lands.

Appeal dismissed with costs.

S. H. Blake, Q.C., for the appellants.

Moss, Q.C., and *Davie, Q.C.*, for the respondents.

DORION v. DORION.

Quebec.]

Substitution—Curator to—Action to account—Indivisibility of—Will—Construction—Transfer—Effect of—Sale of rights—Mandatory—Negotiorum gestor—Parties to suit for partition—Art. 920, C. C. P.—Purchase by co-heir while curator—Art. 1484, C. C.

P. A. A. D. (respondent) as representing the institutes and substitutes under the will of the late J. D. brought an action against J. B. T. D. (appellant) who was one of the institutes and had acted as curator and administrator of the estate for a certain time, for reddition of an account of three particular sums, which the plaintiff alleged the defendant had received while he was curator.

Held, reversing the judgment of the Court below, that an action did not lie against the appellant for these particular sums apart from and distinct from an action for an account of his administration of the rest of the estate.

The plaintiff in his action alleged that he represented S. D. one of the substitutes, in virtue of a deed of release and subrogation by which it appeared he had paid to S. D.'s attorney for and on behalf of the defendant a sum of £437 7s. 6½d., the defendant having in an action of reddition of account settled by a notarial deed of settlement with the said S. D. for the sum of \$4,000 which he agreed to pay and for which amount the plaintiff became surety.

Held, that as the notarial deed of settlement gave the defendant a full and complete discharge of all redditions of account as curator or administrator of the estate, the plaintiff could not claim a further reddition of account of these particular sums.

The plaintiff also claimed that he represented F. D. and E. D., two other institutes under the will, in virtue of two assignments made to him by them on 21st January, 1869, and 15th November, 1869, respectively. In 1865, after the defendant had been sued in an action of reddition of account, by a deed of settlement the said F. D. and E. D. agreed to accept as their share in the estate the sum of \$4,000 each, and gave the defendant a complete and full discharge of all further redditions of account.

Held, affirming the judgment of the Court of Queen's Bench, that the defendant could not be sued for a new account, but could

only be sued for the specific performance of the obligations he had contracted under the deed of settlement.

In 1871, C. Z. D., another of the institutes, died without issue and by his will made the defendant his universal legatee. Plaintiff claimed his share in the estate under a deed of assignment made by defendant to plaintiff in 1862 of all right, title and interest in the estate.

Held, that the plaintiff did not acquire by the deed of 1862, the defendant's title or interest in any portion of C. Z. D.'s share under the will of 1871.

Held, further, that under the will of the late J. D., C. Z. D.'s share reverted to the surviving institutes and substitutes, and that all defendant took under the will of C. Z. D. was the accrued interest on the capital of the share at the time of his death.

By the judgment appealed from the defendant was condemned to render an account of his own share in the estate which he transferred to plaintiff by notarial deed in 1862, and also an account of C. D.'s share, another institute who in 1882 transferred his rights to the plaintiff. The transfer made by defendant was in his capacity of co-legatee of such rights and interests as he had at the time of the transfer, and he had at that time received the sixth of the sums for which he was sued to account.

Held, reversing the judgment of the Court below, that the plaintiff took nothing as regards these sums under the transfer, and even if he was entitled to anything, the defendant would not be liable in an action to account as the mandatary or *negotiorum gestor* of the plaintiff.

2. That F. D. and E. D. having acquired an interest in C. Z. D.'s share after they had transferred their shares to the plaintiff in 1869, the plaintiff could not maintain his action without making them parties to the suit. Art. 920, C. P. C.

Per Taschereau, J.—Was not the transfer made by the institutes E. D. and F. D. to the plaintiff while he was acting as curator to the substitution null and void under Art. 1484, C. C.?

Appeal allowed with costs.

Lacoste, Q.C., and Bonin for appellant.

Madore for respondent.

EXCHEQUER COURT OF CANADA.

March 18, 1892.

Coram BURBIDGE, J.

CLARK et al. v. THE QUEEN.

Practice—Extension of time for leave to appeal after period prescribed by statute has expired—The Exchequer Court Act (1887) sec. 51, 53 Vic., c. 35, s. 1—Grounds upon which extension will be granted.

Where sufficient grounds are disclosed, the time for leave to appeal from a judgment of the Exchequer Court of Canada prescribed by section 51 of *The Exchequer Court Act* (as amended by 53 Vic., c. 35, s. 1) may be extended after such prescribed time has expired. The application in this case was made within three days after the expiry of the 30 days within which an appeal could have been taken.

2. The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time for leave to appeal prescribed by the statute has expired.

3. Pressure of public business preventing a consultation between the Attorney-General for Canada and his solicitor within the prescribed time for leave to appeal, is sufficient reason for an extension being granted although the application therefor may not be made until after the expiry of such prescribed time.

Hogg, Q. C., for motion.

McCarthy, and Christie, Q. C., contra.

March 21, 1892.

Coram BURBIDGE, J.

CORSE et al. v. THE QUEEN.

Goods stolen while in bond in Customs Warehouse—Claim for value thereof against the Crown—Crown not a bailee—Personal remedy against officer through whose act or negligence the loss happens.

The plaintiffs sought to recover from the Crown the sum of \$465.74 and interest, for the duty paid value of a quantity of glazier's diamonds alleged to have been stolen from a box, in which they had been shipped at London, while such box was at the Examining Warehouse at the Port of Montreal.

On the 21st February, 1890, it appeared that the box mentioned was in bond at a warehouse for packages used by the Grand Trunk Railway, at Point St. Charles, Montreal; and on that day the plaintiffs made an entry of the goods at the Customs House, and paid the duty thereon (\$107.10). On Monday, the 24th, the Customs officer in charge of the warehouse at Point St. Charles delivered the box to the foreman of the Customs House carters, who in turn delivered it to one of his carters who took it, with other parcels, and delivered it to a checker at the Customs Examining Warehouse. The box was then put on a lift and sent up to the third floor of the building, where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen,—the theft having been committed by removing the bottom of the box. Although the evidence tending to show that the theft was committed while the box was at the Customs Examining Warehouse at Montreal was not conclusive, the Court drew that inference for the purposes of the case.

Held,—That, admitting the diamonds were stolen while in the Examining Warehouse, the Crown is not liable therefor.

2. In such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy except such as the injured person may have against the officers through whose personal act or negligence the loss happens.

Curran, Q. C., for claimants.

Osler, Q. C., and *Hogg, Q. C.*, for the Crown.

ADMIRALTY DISTRICT OF NOVA SCOTIA.

Coram MACDONALD, (J. (Local Judge).

The Ship "QUEBEC."

Salvage of ship and cargo—Principal and agent—Power of Attorney given by crew to agent of owners of salvaging vessel for purpose of adjustment of salvage claim—Construction of.

A crew of a fishing schooner had performed certain salvage

services in respect of a derelict ship, and gave the following power of attorney respecting the claim for such services to the agent of the owner of the schooner: "We, the undersigned, being all the crew of the schooner *Iolanthe* at the time said schooner rendered salvage services to the barque *Quebec*, do hereby irrevocably constitute and appoint Joseph O. Proctor our true and lawful attorney with power of substitution for us and in our name and behalf as crew of the said schooner to bring suit or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec* recently towed into the port of Halifax, Nova Scotia, by said schooner *Iolanthe*, hereby granting unto our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, and also power at his discretion to constitute and appoint from time to time as occasion may require one or more agents under him or to substitute an attorney for us in his place, and the authority of all such agents or attorneys at pleasure to revoke."

Held,—That this instrument did not authorize the agent to receive the salvage payable to the crew or to release their lien upon the ship in respect of which the salvage services were performed.

2. That payment of a sum agreed upon between the owners of such ship and the agent and the latter's receipt therefor, did not bar the salvors from maintaining an action for their services.

PROCEEDINGS IN APPEAL—MONTREAL.

Monday, May 16.

Benoit & Carpenter.—Motion for leave to appeal from an interlocutory judgment.—C. A. V.

Taillefer et al. & British America Assurance Co.—Motion by defendant for leave to appeal from an interlocutory judgment.—C. A. V.

Beaulac & Leclaire.—Motion by defendant for leave to appeal from an interlocutory judgment.—C. A. V.

Shotton & Lawson.—Motion to reject appeal dismissed.

Lefebvre & Beaudin.—Heard on appeal from judgment of the Superior Court, Montreal, Wurtel, J., Jan. 16, 1889.—C. A. V.

Desjardins & Bruchesi.—Part heard on appeal from judgment of the Superior Court, Montreal, maintaining an answer-in-law, and rejecting defendant's plea.

Tuesday, May 17.

Taillefer et vir & British America Assurance Co.—Motion for leave to appeal from an interlocutory judgment rejected.

Desjardins & Bruchesi.—Hearing concluded.—C. A. V.

C. P. R. Co. & Pellant et vir.—Heard on appeal from a judgment of Superior Court, Montreal, Pagnuelo, J.—C. A. V.

Ouimet & Benoit.—Heard on appeal from a judgment of the Superior Court, Montreal, Loranger, J., Feb. 27, 1891.—C. A. V.

Wednesday, May 18.

Picault & Guyon dit Lemoine.—Struck from the roll by consent.

Hétu & Menard.—Heard on appeal from a judgment of the Superior Court, Montreal, DeLorimier, J., Nov. 23, 1889.—C. A. V.

Wood & Maloney.—Heard on appeal from a judgment of the Superior Court, Montreal, Wurtele, J., Oct. 28, 1890.—C. A. V.

Evans & Corestine.—Appellant desists from the appeal.

St. Lawrence Sugar Refining Co. & Ives.—Part heard on appeal from a judgment of the Superior Court, Montreal, Loranger, J., May 12, 1890.

Thursday, May 19.

Patterson et al. & Stevenson, & Wisner, contesting.—Motion of Patterson et al. for leave to appeal from a judgment of 5th May instant.—C. A. V.

Burland & Grand Trunk R. Co.—Heard on appeal from judgment of the Superior Court, Iberville, Charland, J., Feb. 15, 1890.—C. A. V.

Chevalier et vir & Banque du Peuple.—Heard on appeal from judgment of Superior Court, Iberville, Charland, J., March 17, 1890.—C. A. V.

McDonald & Ferdaïs.—Heard on appeal from judgment of Superior Court, Iberville, Wurtele, J., Sept. 28, 1889.—C. A. V.

Friday, May 20.

Fernet & Charron dit Ducharme.—Heard on appeal from judgment of the Superior Court, Richelieu, Ouimet, J., May 2, 1890.—C. A. V.

Pearson & Spooner.—Heard on appeal from judgment of the Court of Review, Montreal, Dec. 30, 1890.—C. A. V.

Cie. de Navigation R. & O. & Triganne.—Heard on appeal from judgment of the Superior Court, Richelieu, Ouimet, J., April 2, 1889.—C. A. V.

Tourville et al. & Macdonald.—Heard on appeal from judgment of the Superior Court, Richelieu, Papineau, J., May 10, 1887.—C. A. V.

Saturday, May 21.

Benoit & Carpenter.—Motion for leave to appeal from an interlocutory judgment granted.

Beaulac & Leclair.—Motion for leave to appeal rejected.

Patterson & al. & Stevenson & Wisner.—Motion for leave to appeal rejected.

Patterson et al & Stevenson & Redmond.—Motion for leave to appeal rejected.

Vallée & Préfontaine.—Confirmed, Bossé and Ouimet, JJ., dissenting.

Dufresne & Préfontaine.—Confirmed, Bossé and Ouimet, JJ., dissenting.

Cadieux & Taché.—Reversed, Hall and Wurtele, JJ., dissenting.

Auger et al. & Labonté et al.—Confirmed.

C. P. R. Co. & Collins.—Confirmed, Hall, J., diss.

C. P. R. Co. & Larmonth.—Confirmed, Hall, J., diss.

Stewart & St. Ann's Mutual Building Society.—Confirmed.

Lefebvre & Magnan.—Confirmed.

Canadian Bank of Commerce & Stevenson.—Reformed.

Browne & Leclerc.—Confirmed.

Corporation de Longueuil & Préfontaine.—Reversed.

Carrière & Beaudry.—Reversed.

Maclaren & Luperrière.—Confirmed.

McBean & Marler.—Confirmed.

Ahern & U. S. Life Insurance Co.—Confirmed.

DeGagné & Davidson.—Confirmed.

Tremblay & Davidson.—Confirmed.

Gilmour & Letourneau.—Confirmed.

Clement & Corporation of Ste. Scholastique.—Reversed.

The following cases, in which no proceedings have been had within the year, were struck :—Stanley & Tait; Protestant Hospital & Tackeray; Windsor Hotel Co. & Charpentier; Campeau & Grange.

The Court adjourned to Monday, June 6.

*INSOLVENT NOTICES.**Quebec Official Gazette, May 14 & 21.**Judicial Abandonments.*

- DENIS, Alfred (Denis & Durocher), St. Hyacinthe, May 12.
GIBEAU, Dame Dorcas (D. Parent & Co.), coal dealer, Montreal, May 18.
LEBRUN, Alexis, trader, Fraserville, May 9.
MERCIER, Charles Amédée, Montmagny, May 9.
MILETTE, François Alphonse, Windsor Mills, May 12.
RACICOT, Cha. Emile, Montreal, May 6.

Curators appointed.

- BENOIT, William, St. Jean-Baptiste de Rouville.—A. Girard, Marieville, curator, May 4.
BRIGGS, Wm. H.—H. Beatty, Stanbridge East, curator, May 2.
CHAPMAN, Alfred, and James Drysdale, Lachute.—G. J. Walker, Lachute, curator, May 11.
FORTIER, Phil.—A. Lemieux, Levis, curator, May 14.
McCAFFREY, Francis.—F. Valentine, Three Rivers, curator, May 13.
McCORMICK, Duncan, lumber manufacturer, Côte St. Antoine.—John Hyde, Montreal, curator, May 9.
McGARRITY, P.—DeLery Macdonald, Montreal, curator, April 28.
MOODIE, William, Montreal.—J. McD. Hains, Montreal, curator, May 6.
RACICOT, C. E.—Bilodeau & Renaud, Montreal, joint curator, May 13.
WILLOUGHBY BROS.—W. A. Caldwell, Montreal, curator, May 14.

Dividends.

- BÉDARD, David F.—First and final dividend, payable May 30, Royer & Burrage, Sherbrooke, joint curator.
BROUSSEAU, Miles R.—First and final dividend, payable June 7, L. N. Belisle, St. Pie, curator.
BURQUE, Willie, St. Hyacinthe.—Second and final dividend, payable June 4, J. O. Dion, St. Hyacinthe, curator.
CARTWRIGHT, Dame S. A. (G. Lepage).—First and final dividend, payable May 30, Bisson & Barry, Montreal, curators.
ELDER, John.—Dividend on proceeds of real estate, payable June 1, W. S. Maclaren, Huntingdon, curator.
FALARDEAU & Paquet, Quebec.—First and final dividend, payable June 6, N. Matte, Quebec, curator.

THE LEGAL NEWS.

VOL. XV.

JUNE 16, 1892.

No. 12.

In *Jetté & Crevier* (Montreal, June 8) the Court of Appeal, by a unanimous decision, settled a question of considerable importance, which has been variously decided by judges of the lower Courts. The question was whether Art. 2250, C.C., which declares that, with the exception of what is due to the Crown, all arrears of interest are prescribed by five years, includes also interest on a judgment. The Court of Review, Montreal, Lorange, Wurtele, and Davidson, JJ., unanimously held in the affirmative (M. L. R., 6 S. C. 48), and this decision has been unanimously affirmed in appeal. The judgment in both Courts rested upon the terms of Art. 2250. Mr. Justice Bossé, who pronounced the judgment of the Court of Appeal, observed : "L'on ne saurait guère trouver de langage plus précis et plus complet pour exprimer l'idée que dès qu'il s'agit d'intérêts, quelqu'en soit la provenance ou l'origine, ils sont tous également frappés de la prescription uniforme de cinq années."

Another question which has created a good deal of difficulty in the Superior Court for some years past, is the award of costs in actions where the plaintiff succeeds for only a portion of the amount demanded. The practice for many years was simply to award costs as of the amount of the judgment, unless the defendant had made

a tender of an amount held to be sufficient by the Court. This practice has been departed from to some extent within the last few years, and the defendant was sometimes put in as favorable a position while contesting the entire demand as if he had made a tender and deposit. The Court of Review in a series of decisions has endeavored to establish the old rule upon a firm basis. See among other cases, *Clermont v. McLeod*, M. L. R., 6 S. C. 36; *Daoust v. Dumouchel*, *ib.*, 40; *Couture v. C. P. R. Co.*, M. L. R., 7 S. C. 431; *Labelle v. Didier*, *ib.*, 439. One of these cases, *Couture v. C. P. R. Co.*, has been taken to appeal as a test case, and on June 8, the judgment of the Court of Review, which will be found reported at length in M. L. R., 7 S. C. 431, was affirmed.

We have more than once referred to the promptitude with which vacancies on the bench are filled in England, contrasting with the long interval which is sometimes permitted to intervene in Canada. The last issue of the *London Law Journal* furnishes another example. The same issue announces the death of Sir Charles Butt, President of the Probate Division, the promotion of Mr. Justice Jeune to the presidency, and the appointment of Mr. Gorell Barnes, Q.C., to the seat vacated by Mr. Justice Jeune. The men involved in these changes are young. Mr. Justice Butt was comparatively a young judge, born in 1830, and called to the bar in 1854. On the retirement of Sir R. Phillimore in 1883, he was elevated to the bench as a judge of the Admiralty Division, and on the promotion of Sir James Hannen to a lordship of appeal in ordinary at the beginning of last year, Sir Charles Butt was promoted to the Presidency of the Division, a position which he was destined to occupy only sixteen months. Sir Charles Butt, who has been in ill health for some time, died May 25, of paralysis of the heart. His successor, Mr. Justice Jeune, has been only sixteen months on the bench, and Mr. Barnes, who steps into Mr. Justice Jeune's place, has been only sixteen years at

the bar. He took silk in 1888, and has enjoyed a large practice in commercial and admiralty cases. No one so young has been elevated to the bench since the appointment of the late Lord Justice Thesiger at the age of thirty-nine.

Recent issues of the new official law reports contain numerous typographical errors which detract from the confidence which should be reposed in a work of reference. This has arisen from the printer failing to submit proofs of reports to the contributors, he being embarrassed by deficiency of type and other plant, and being unable to keep matter standing. The same deficiency of material has also considerably retarded the appearance of the issues. It is expected that these and other difficulties incidental to the undertaking of a considerable work by a novice in the printing business will be overcome in time, and that the work will progress with the regularity which is naturally expected.

*THE LAW OF LOTTERIES—CONSTITUTIONALITY
OF THE DOMINION ACT, R.S.C. 159.*

In *Reg. v. Harper*, Montreal, May 31, Mr. Dugas, police magistrate, delivered the following judgment, maintaining the constitutionality of Dominion legislation on the subject of lotteries:—

I have before me several complaints made against divers persons under chapter 159 of the Revised Statutes of Canada, prohibiting lotteries under a penalty of \$20, summarily recoverable before a justice of the peace. There has been filed before me in each case an exception denying to the Federal Parliament the right to pass such a law and asking the Court to declare it unconstitutional. The actual law is nearly the reproduction of 19 & 20 Victoria drawn from chap. 47, George III, and afterwards incorporated in the old Consolidated Statutes of Canada, chap. 95. Three years later (chap. 36, 23 Vic.) that statute was amended so as to make no exception in favor of bazaars held for charitable purposes, etc. When Confederation was established it was the only amendment which had been made. Later again the local legislature, by chapter 36 of 32 Victoria, evidently considering

that the legislation concerning lotteries belonged to the local legislatures, re-amended said chapter 95, and took away in favor of the construction of chapels, churches, the establishment of colonization, etc., the restriction applicable to bazaars, which limited the value of lots to \$50 each. The Federal Government on its side also thought fit to amend the same chapter by chapter 36 of 46 Victoria, extending the dispositions in favor of bazaars to societies established for the encouragement of objects of art, namely, paintings, drawings, etc., and when the revision of the Federal statutes took place in 1886, said chapter 95, as amended before Confederation, was incorporated therein leaving aside, consequently not recognizing, the local act of the province of Quebec, chapter 36 of 32 Victoria. The Federal Act is under the chapter 159, under which the present actions are taken.

When the provincial statutes were consolidated in 1888 the Legislature of the province of Quebec inserted therein also the same chapter 95 under articles 2911 to 2923, leaving aside in its turn the amendment of the Federal Parliament in favor of the societies established for the encouragement of art, as above mentioned. Lastly, by chap. 36 of 53 Victoria, that provincial act was again amended so as to extend the grant of the lotteries authorized by article 2920, "to establishments of public interest, and to education, and by subordination to hold a permanent lottery, by the sanction of Governor-in-council, with the obligation to make reports if demanded or required." This is as nearly as possible the history of that legislation, as we have it to-day in the Statutes of the Federal and provincial governments.

Naturally enough the defendants, who are the organizers of lotteries or vendors of tickets, refuse to recognize the constitutionality of the federal law. Their efforts are directed to demonstrating that this law is but a police law or of simple infraction, because, first, the offence is not declared to be either a felony or a misdemeanor by the act which creates it; second, that lotteries, not being *mala in se* or an offence under the common law, cannot be considered as a criminal act properly speaking. Article 91 of the B. N. A. act is instanced as declaring amongst other things "that the exclusive legislative authority of Parliament of Canada extends to all matters falling under the category of subjects therein enumerated," and more particularly section 27, which reads "the criminal law, except the constitution of Courts of criminal jurisdiction, etc.," and from this it is argued that this category of this

class of offences, not being criminal properly speaking, cannot fall under that disposition.

There is no doubt that there are a number of offences under our criminal system which it is difficult to classify, because the law does not give a definition thereof. It is only after the creation of the justices of the peace that legislation first appears prohibiting certain deeds until then considered as inoffensive, and giving them power to punish those guilty thereof; one of those offences was the carrying of firearms. In time the number of those offences was multiplied and the jurisdiction of the justices of the peace augmented; later, magistrates of police were named and greater power entrusted to them, and to-day, in England as in Canada, those functionaries have a summary jurisdiction as well upon a number of common law and statutory crimes as upon offences of minor importance. Larcenies, false pretences, robbery, embezzlement, receiving stolen goods, are as many criminal acts which can be summarily adjudicated upon by the magistrate if the value of the property wrongly obtained does not exceed \$10. As to the offences it is difficult to classify them and to say if, as a body, they belong to the category of misdemeanors in general, or a certain number thereof only, or if rather they do not by themselves form a class of offences for which the law gives no definition, but which it only creates and describes whenever the need arises, either to prevent the continuance of deeds in themselves often not greatly offensive, but the multiplication of which might become a danger to society, or to enforce the execution of administrative measures of public interest; the laws of customs, excise and revenue generally, which all contain penal clauses, are generally applicable by the magistrate in summary proceedings.

The authors themselves have some hesitation to lay down a standing rule, but Harris, in his Criminal Law, page 5, on Morality and Crime, says:—"The moral nature of an act is an element of no value in determining whether it is criminal or not. On the one hand an act may be grossly immoral, and yet it may not bring its agent within the pale of the criminal law, as in the case of adultery. Human laws are made not to punish sin, but to prevent crime and mischief." On the other hand, an act perfectly innocent, from a moral point of view, may render the doer amenable to punishment as a criminal. To take for an extreme example: W. was convicted on an indictment for a common nuisance, for erecting an embankment which, although it was in

some degree a hindrance to navigation, was advantageous in a greater degree to the users of the port. Here the motive, if not praiseworthy, was at least innocent. The fact that the motive of the defendant was positively pious and laudable has not prevented a conviction.

This forces upon our notice a division of crimes into *mala in se* and *mala quia prohibita*, a distinction which is of little practical importance in our English system, and which must necessarily vary the standard of good and bad. There will always be some crimes which naturally take their place in the one or the other. For example, no one will hesitate to say that murder is *malum in se*, or that the secret importation of articles liable to customs is merely *malum quia prohibitum*; but between these offences there are many acts which it is difficult to assign to their proper class. In his history of the criminal law of England Sir James F. Stephen says in chapter 1, pages 1, 2 and 3: "Before undertaking either of these tasks I must endeavor to define what I mean by the criminal law. The most obvious meaning of the expression is that part of the law which relates to crimes and their punishment—a crime being defined as an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act..... The description of criminal law, which I have substituted for a definition in the stricter sense of the word, is intended to exclude two large and important classes of laws which might, perhaps, be included not only with theoretical propriety, but in accordance with popular language, under the phrase 'criminal law.' These are, first, laws which constitute summary or police offences, and, secondly, laws which impose upon certain offenders money penalties, which may be recovered by civil actions, brought in some cases by the person offended, in others by common informers. Summary offences have of late years multiplied to such an extent that the law relating to them may be regarded as forming a special head of the law of England. Such offences differ in many important particulars from those gross outrages against the public and against individuals which we commonly associate with the word crime. It would be an abuse of language to apply such a name to the conduct of a person who does not sweep the snow from before his doors, or in whose chimney a fire occurs. On the other hand, many common offences against person and property have of late years been rendered liable to punishment by courts of summary jurisdiction."

Stephen, in chapter xxxii, vol. 3, pages 263 to 265, says most of the offences over which the magistrates exercise a summary jurisdiction consist in the breach of regulations laid down by act of parliament, in order to prevent petty nuisances or to enforce the execution of administrative measures of public importance. Of these I will briefly enumerate a few. Some of them relate to matters of the utmost importance and the deepest historical interest, but which have so very faint and slight a connection with the criminal law that it would be out of place to enter upon that history at length in a work like the present. They are, however, on education, where a parent is liable to fine for not sending his children to school. Police offences, public health and safety, and revenue offences, vagrancy, and under the head of miscellaneous come fishery offences, cruelty to animals, unlawful gaming, etc.

Admitting, therefore, that lotteries, as prohibited by chapter 158 of the Consolidated Statutes, form part of that uncertain category of minor offences, and that they are neither felonies nor misdemeanors in the sense of the criminal law well understood, would the Parliament of Canada have acted *ultra vires* in prohibiting them? The pretensions of the defendants are that in these cases the local parliaments alone have the right to act. I have read and re-read the constitution and more particularly article 92, which establishes the exclusive power of provincial legislatures, and I find nothing which gives them that exclusive privilege. I admit that when they have to make laws within the bounds assigned to them by the constitution, their authority is as ample and sovereign as that of the Imperial Parliament. This is the principle which has been clearly established in the case of *Queen v. Hodge*, and this principle suffers no contradiction. Thus the local legislatures having the exclusive right to make laws according to article 92, section 7, concerning licenses of taverns, auctioneers, etc., and by section 15 to inflict penalties by fine or imprisonment, to enforce all laws over which they have jurisdiction, it is clear that they have the right also to create offences and to enforce those laws. I will add that the same power exists for the other laws which fall under the jurisdiction and contained in the other parts of the constitution, notwithstanding the fact that nothing is said about it.

And as by section 16 of the same article 92 exclusive power is besides given to the local legislatures to make laws, "generally upon matters of a purely local or private nature within the prov-

ince," I have no hesitation to admit that they have the right to prohibit anything of a purely local nature which might be against the interests of the province, even if they were offences or infractions of a minor nature and even to impose a fine or imprisonment; and still there is nothing in the constitution which formally declares it, and if those local parliaments have *that right* it is in virtue of the sovereign power which they possess to protect themselves within the bounds of their attributions, and by prohibiting what may be particularly obnoxious to them or by establishing what they have particular interest in establishing, provided that the general interests of the other provinces are not affected thereby, and that there is no infringement upon the rights attributed to the central power. But that sovereign power recognized in favor of local legislatures does not take away the same sovereign power which the Federal Parliament must essentially possess.

If both the Imperial Parliament and the provincial legislatures can prohibit anything which falls under their jurisdiction, it cannot be denied that the Federal Parliament, in which each province is represented, has the power to declare obnoxious, injurious or mischievous anything which it may believe to be so in the interest of the Dominion at large. If the local Legislature has the right to create an offence and to impose fine and imprisonment in the provincial interests, why should the Federal Parliament not have the same right in a federal interest? Nothing in the constitution is to the contrary, and whatever is said in section 92 does not go further. Nowhere can it be found that those infractions are exclusively in the jurisdiction of the local legislatures, whilst article 91 on the contrary firmly declares that the Senate and the House of Commons will have the right to pass laws for the maintenance of peace, of good order and good government on all classes of matters which are not exclusively attributed to local legislatures. It is not, therefore, absolutely necessary to revert to section 27 of article 91 in order to find the right of the Federal Parliament to pass laws upon such minor offences. The above citation is sufficient, for there cannot be found any such exclusive rights given to the provincial legislatures. In that article 92 nothing is said of the above offences, either explicitly or implicitly, and more particularly of lotteries, should they be considered to belong to that kind of offences. The municipal system under the authority of which by-laws and police regulations could be passed for local or municipal purposes, as also there-

gulation of taverns, auctions, etc., no more than the rest of what is contained in that article 92, does not take away from the Federal Parliament the power which is expressly given to it to pass laws to maintain peace and good order in Canada, which, besides, is inherent to its constitution and its sovereign power.

The conclusion at which I have arrived renders it unnecessary for me to consider whether lotteries are in themselves misdemeanors under the common law, and whether they do not fall under the term criminal law mentioned in section 27 of article 91. In the same way having to decide whether chapter 159 is or is not constitutional, I cannot take into consideration any other point which might incidentally be raised in favor of a lottery, established in virtue of the provincial act above referred to, and I purely and simply declare that to my mind the Federal Parliament had implicitly the right to consider lotteries in general, contrary to good order and the interests of the public, to legislate against them, and therefore chapter 159 is constitutional.

UNCONTROLLABLE CRIMINAL IMPULSE.

The "uncontrollable criminal impulse" theory, which played such an amusing part in Lord Esher's judgment in *Hanbury v. Hanbury*, has had a curious history and stands at the present moment in a somewhat equivocal position in English law. Little more than a century ago Mr. Philippe Pinel, who held the office of chief physician to the Bicetre asylum in Paris, announced his discovery of a type of insanity in which the moral faculties of the victim were alone involved. He called it *manie sans délire*. After having acquired no inconsiderable reputation on the Continent, this disease began to figure in the writings of English and American medico-legal experts. Dr. Ray in particular, the author of the well-known American treatise on the "Medical Jurisprudence of Insanity," strenuously asserted its existence, and supported his assertion by a number of cases in which he alleged that not only was there marked disorder of the moral faculties without any lesion of the understanding, but the patient labored under an "irresistible" or "uncontrollable" impulse to commit acts of criminal violence. A few years after the publication of Dr. Ray's book Daniel Macnaghten was tried before Chief Justice Tindal and a jury for the murder of Mr. Drummond, private secretary to Sir Robert Peel. He was defended with consummate ability by the late Sir Alexander Cockburn, and was justly but

illegally acquitted. In the course of his address to the jury, Cockburn referred in very laudatory terms to Dr. Ray's treatise and the doctrines which it promulgated, and induced the judge and the jury unconsciously to set aside the criterion of responsibility in mental disease laid down by Lord Mansfield on the trial of Bellingham. Macnaghten's acquittal aroused a tempest of public indignation. One honorable member prepared a bill for the practical abolition of the plea of partial insanity in capital cases, and although this measure was fortunately defeated, a general desire was evinced that the rigor of the criminal law as to the test of lunacy should be increased. Accordingly the House of Lords, with the assistance of the common-law judges, declared *ex cathedra* that only that degree of insanity which prevented a prisoner from knowing the nature and quality of his act would suffice to exempt him from responsibility to the law. Now the victim of moral insanity or uncontrollable impulse does "know the nature and quality of his act," according to the superficial meaning of the phrase, and it seemed therefore as if the rules in *Macnaghten's Case* had definitely shut the gates of mercy against the victims of this disease. Nominally they have done so no doubt, but the heresy created by Pinel, and propagated by Dr. Ray, has made very decided progress in England notwithstanding. In the first place the brotherhood of "mad doctors" has made some concessions to common sense. It is not now contended that the intellect of the moral lunatic is perfectly sound. Nor is the ægis of moral insanity thrown with the same persistence as before in front of every scoundrel in whose defence ingenuity can devise or urge no other plea. In the second place the law no longer stands where it did. The old judicial pleasantries on the subject of "uncontrollable impulse" are now so rare that it is quite refreshing to hear them so happily revived by the master of the rolls. Many of the judges readily admit that the rules in *Macnaghten's Case* require "manipulation," and manipulate them at *nisi prius* with the full sympathy of juries of assize. The plea of irresistible impulse is tacitly allowed, constantly in cases of infanticide, and occasionally even in cases of theft, and there can be little doubt that, if the criminal law of England were codified, legislative sanction would be given to the glosses which Sir James Stephen has added to the words of Mr. Justice Maule (*cf.* Dig. Cr. L., art. 27).—*London Law Times*.

PROCEEDINGS IN APPEAL—MONTREAL.

Monday, June 6.

Auger et al. & Labonté et al.—Motion for leave to appeal to Privy Council.—C.A.V.

Stock & Gazette Printing Co.—Motion for leave to appeal from interlocutory judgment.—C.A.V.

Atlantic & North West Ry. Co. & Atty. Gen. & City of Montreal.—Part heard on appeal from judgment of the Superior Court, Montreal, Mathieu, J., 16 May, 1891.

Tuesday, June 7.

Auger et al. & Labonté et al.—Motion for leave to appeal to the Privy Council rejected.

Atlantic & North West Ry. Co. & Atty. Gen. & City of Montreal.—Hearing concluded.—C.A.V.

Great Eastern Ry. Co. & Lambe es qual.—Heard.—C.A.V.

Wednesday, June 8.

Address of congratulation from the Bar presented to Hon. Sir Alexander Lacoste, on his receiving the honour of Knighthood.

Stock & Gazette Printing Co.—Motion for leave to appeal granted.

Desorcy & Morin.—Reversed.

Corporation de St. Ours & Morin.—Reversed.

Lafontaine & Beauchemin.—Confirmed.

Dolan & Baker.—Confirmed, Bossé, J. dissenting.

Jetté & Crevier.—Confirmed.

Union des Abattoirs & Ville de St. Henri.—Reformed, with costs against respondent.

Goldie & Beauchemin & Rasconi.—Confirmed.

Canada Shipping Co. & Davison.—Confirmed, Bossé and Blanchet, JJ., diss.

Canadian Pacific Ry. Co. & Pellant.—Confirmed, Bossé and Blanchet, JJ., dissenting.

Malo & Gravel.—Reversed.

Dechene & City of Montreal.—Confirmed.

Great Eastern Ry. Co. & Lambe.—Confirmed.

Canadian Pacific Ry. Co. & Couture.—Confirmed, Bossé, J., diss.

Huot & Noiseux.—Reversed as to costs of Court below; appeal dismissed as to the rest; with costs in favor of appellant; Bossé and Blanchet, JJ., dissenting as to costs in Superior Court.

Noiseux & Huot.—Confirmed.

Canada Atlantic Ry. Co. & Trudeau.—Judgment of the Court of Review reversed, and judgment of the first Court confirmed, Bossé and Blanchet, JJ., diss.

The Court adjourned to Thursday, Sept. 15.

Délibérés after May Term.

Lefebvre & Beaudin ; Desjardins & Bruchesi ; Ouimet & Benoit ; Wood & Maloney ; Burland & G. T. Ry. Co. ; Chevalier & Banque du Peuple ; McDonald & Ferdais ; Fernet & Charron & Ducharme ; Pearson & Spooner ; Cie. Nav. R. & O. & Treganne ; Tourville & McDonald ; Héту & Ménard ; Atlantic & North West Ry. Co. & Atty. Gen. & City of Montreal.

INSOLVENT NOTICES.

Quebec Official Gazette, May 14 & 21.

Dividends.

GAUDETTE & Co., Farnham.—First and final dividend, payable June 2, E. Donahue, Farnham, curator.

GERMAIN & Co., D. N., Montreal.—First dividend, payable June 8, Kent & Turcotte, Montreal, joint curator.

GODBOUT fils, François.—*Interim* dividend, payable May 31, A. A. Taillon, Sorel, curator.

HAYES, Michael, Sheenboro.—First and final dividend, payable May 31, W. A. Caldwell, Montreal, curator.

JOHNSON, C. E., Warwick.—First dividend, payable June 7, Quesnel & Bedard, Quebec, curator.

LABERGE & Co., Aug., Ste. Luce.—First and final dividend, payable June 7, H. A. Bedard, Quebec, curator.

MERCIER, Joseph.—First and final dividend, payable May 25, J. M. Marcotte, Montreal, curator.

MONGENAI, L. A., Rigaud.—First dividend, payable June 6, Lamarche & Olivier, Montreal, joint curator.

QUEVILLON, Jean B.—First and final dividend, payable May 31, Millier & Griffith, Sherbrooke, joint curator.

ROY, P. E., Coaticook.—First dividend, payable June 9, Royer & Burrage, Montreal, joint curator.

TURGEON, Darveau & Co., Quebec.—First and final dividend, payable June 6, N. Matte, Quebec, curator.

Quebec Official Gazette, May 28, June 4 & 11.

Judicial Abandonments.

BARRAS, Edouard, trader, Levis, May 28.

FRECHETTE, Amedée, hotel-keeper, St. Césaire, May 25.

GOLDBLOOM, Samuel, jeweller, Montreal, May 31.

GUILBAULT & fils, Ed., boot and shoe manufacturers, Terrebonne, May 31.

LAROCHELLE, Léon, trader, St. Henri, June 2.

Curators Appointed.

BIRON, Trefflé.—F. Thibodeau, St. Maurice, curator, June 4.

DENIS, Alfred (Denis & Durocher).—J. Morin, St. Hyacinthe, curator, June 1.

FRÉCHETTE, Amédée, St. Césaire.—C. Pepin, St. Césaire, curator, June 6.

GIBEAU, Dame Dorcas (D. Parent & Co).—C. Desmarteau, curator, May 25.

GOLDBLOOM, Samuel.—W. A. Caldwell, Montreal, curator, June 11.

LATOUB, George, Joliette.—Lamarche & Olivier, Montreal, joint curator, June 4.

LEBRUN, Alexis.—M. Deschênes, Fraserville, curator, May 27.

MILETTE, François, Windsor Mills.—Royer & Burrage, Sherbrooke, joint curator, June 1.

MORIN, Joseph, Montreal.—Kent & Turcotte, Montreal, joint curator, May 20.

Dividends.

ARMSTRONG, Archibald.—First and final dividend, payable June 23, Millier & Griffith, Sherbrooke, joint curator.

BRISSON, Dame Zénaïde (D. Desjardins & Co.), Montreal.—First and final dividend, payable June 26, F. Bertrand, 261 St. Lawrence Street, Montreal, curator.

BROWN & Son, Jas., Montreal.—First and final dividend, payable June 21, A. W. Stevenson, Montreal, curator.

BUCKINGHAM Pulp Co., Montreal.—Second and final dividend, payable June 30, J. McD. Hains, Montreal, curator.

CARROLL & Co., Montreal.—First and final dividend, payable June 28, J. McD. Hains, Montreal, curator.

CHAMBLY Cotton Co.—First and final dividend, payable June 21, George Hyde, Montreal, liquidator.

CHOINARD, A., leather dealer, Montreal.—Second and final dividend, payable June 21, C. Desmarteau, Montreal, curator.

CLÉMENT & Boivin, Quebec.—Second and final dividend, payable June 13, D. Arcand, Quebec, curator.

CLÉMENT, M., Quebec.—Second and final dividend, payable June 13, D. Arcand, Quebec, curator.

- CREVIER, F. X.**—First dividend, payable June 13, Bilodeau & Renaud, Montreal, curators.
- DÉLISLE & Cie., Geo., Chicoutimi.**—First and final dividend, payable June 28, H. A. Bédard, Quebec, curator.
- DESAULNIERS, Frères & Cie., Montreal.**—Second and final dividend, payable June 21, D. Seath, Montreal, curator.
- FORTIER, Philadelphie.**—First dividend, payable June 14, A. Lemieux, Levis, curator.
- FOURNIER, Jos., printer, Montreal.**—First and final dividend, payable June 14, C. Desmarteau, Montreal, curator.
- GAGNÉ, O'Farell.**—First and final dividend (16½ cents), payable to creditors privileged on movables, A. Gaumond, St. Jean Deschaillons, curator.
- HUBERDEAULT, Dame Malvina (C. Lamoureux & Cie.)**—First and final dividend, payable June 15, Millier & Griffith, Sherbrooke, joint curator.
- HUNTER, S.**—First and final dividend, payable June 13, L. J. Lefavre, Montreal, curator.
- MÉTHOT, Adolphe.**—First and final dividend, payable June 28, H. A. Bedard, Quebec, curator.
- MORIN & Co. (Dr. Ed.), Quebec.**—First and final dividend, payable June 14, H. A. Bedard, Quebec, curator.
- NAUD, F. H., St. Casimir.**—First dividend, payable June 15, G. H. Burroughs, Quebec, curator.
- PATERSON & Co., John A., Montreal.**—First dividend, payable June 21, A. W. Stevenson, Montreal, curator.
- PELLETIER & Co.**—New dividend sheet prepared, payable June 21, Royer & Burrage, Sherbrooke, joint curator.
- PELLETIER, J. A., Montreal.**—First and final dividend, payable June 23, C. Desmarteau, Montreal, curator.
- ROUSSEAU & Vézina.**—First and final dividend, payable June 13, F. Valentine, Three Rivers, curator.
- TOUCHETTE, Joseph alias Zozime, Abbotsford.**—First and final dividend, payable June 28, J. O. Dion, St. Hyacinthe, curator.
- VINCELETTE, Alfred, St. Léonard.**—First and final dividend, payable June 21, Lamarche & Olivier, Montreal, joint curator.
- VINEBERG, Harris, Montreal.**—First dividend, payable June 27, Kent & Turcotte, Montreal, joint curator.
- WILSON & McGinnis, Athelstan.**—First and final dividend, payable June 21, J. McD. Hains and W. S. McLaren, joint curator.

GENERAL NOTES.

WILLS.—The Supreme Court of Pennsylvania in a recent case, "Scott's Estate," held that a letter addressed to an attorney, directing him to draw a will in accordance with the terms of the letter—stating them—the paper being in the handwriting of the testator, signed by him and witnessed, contained every requisite of a valid will, and letters testamentary were ordered to be issued thereon.

EXERCISE OF THE FRANCHISE.—In the twenty-seven villages where women voted for school directors last Saturday, they were defeated in all excepting three. What is even more remarkable is the fact that in almost every case the women's defeat was due to the votes of women. Every woman who failed to get her name on the woman's ticket seems to have voted against it.—*Chicago Legal Adviser*.

TRADE-MARK.—It is well settled that no one can acquire by adoption such an interest in the name of another person as to prevent the latter from using his own name in a fair and honest manner in the ordinary course of business, and that to justify the use by a person of any man's name as against the man who bears the name, some contract relation or estoppel must be found to exist, operating to deprive the latter of what would otherwise be his right. (*Rogers v. Rogers*, Am. trade-mark cases, 999; *Skinner v. Oaks*, id., 459; *Richmond v. Richmond Nervine Co.*, 52 O. G. 307; 2 G. W. D. 45).

NEGRO COLONIAL JUDGES.—Two negroes have attained to judge-ships in British colonies. One, Joseph Renner Maxwell, is chief judicial officer at the Gambia, in Africa. Oddly enough he has written a work upon the negro question in which he speaks with apparent horror of the most striking outward peculiarities of his race, and urges as the only method of elevating the negro, future miscegenation with other races. The other negro judge is Sir W. C. Reeves, Chief Justice of Barbadoes, in the British West Indies. He presides over the Supreme Court, and there are on the island seven police magistrates of subordinate jurisdiction.—*Mail (Toronto)*.

EFFECT OF A 'NOLLE PROSEQUI.'—It has been stated by the Attorney-General for Ireland in the House of Commons that it is at least possible that the convict Montagu may be again indicted for cruelty to her children, notwithstanding that in the recent trial a *nolle prosequi* was entered in respect of that part of

the charges against her. Strange as it may seem, it is nevertheless undoubted law that a *nolle prosequi* does not operate as an acquittal, but that the party remains liable to be re-indicted (see Archbold's 'Criminal Pleading,' 20th edit. at p. 120, citing amongst other cases *Regina v. Allen*, 31 Law J. Rep. M. C. 129, and *Regina v. Mitchell*, 3 Cox, 93. In a note to the report of *Regina v. Allen*, we find that in *Regina v. Ridpath*, Fortescue, 358, the Court is reported to have said ; 'The *nolle prosequi* is no bar or discharge or leave of the Court to depart ; for it is only that the Attorney-General will not further proceed on that information ; the information is discharged but not the person. Judgment is not "quod eat inde sine die," but "non vult ulterius prosequi et ideo cessat processus super informationem omnino." And in *Regina v. Mitchell* Sir Colman O'Loughlen, *arguendo*, cited three cases in which the entering of a *nolle prosequi* had been followed by a second information.—*Law Journal* (London).

TOBACCO A DRINK.—A singular case is reported from Vermont. There is a law in that State which allows a new trial if a party obtaining a verdict in his favor "shall, during the term of the court in which such verdict is obtained, give to any of the jurors in the court, knowing him to be such, any victuals or drink, or procure the same to be done, by way of treat, either before or after such verdict." A successful litigant, after a verdict had been obtained in his favor, "treated" the members of the jury to cigars, and a new trial was granted. The Supreme Court has decided that the order granting a new trial was correct. The main opinion was to the effect that "treating" with a cigar was as much against the spirit of the law as treating with victuals or with drink, and that this method of rewarding the jury was as harmful as that directly mentioned in the law. Judge Taft, however, did not reach the result by any such method of reasoning. He says boldly : "I concur in the result. Tobacco is both a victual and drink. It is taken as a nourishment, sustenance, food, etc. ; therefore, a victual. It is not an obsolete use of the word to call it drink. Joaquin Miller says : 'I drink the winds as drinking wine.' If a man can drink wind, I think he can drink tobacco smoke, vile and disgusting as it is. A man is compelled to drink it, by having it puffed in his face on all occasions and in all places, from the cradle to the grave. It is a drink. Set aside the verdict." This opinion deserves preservation as a rare gem of judicial argument.—*New York Tribune*.

THE LEGAL NEWS.

VOL. XV.

JULY 1, 1892.

No. 13.

CURRENT TOPICS AND CASES.

The swift recurrence of changes on the English bench is suggested by a review of those which have occurred during the chancellorship of Lord Halsbury. Three out of the four Lords of Appeal in Ordinary, Lords Macnaghten, Morris and Hannen, owe their places to him, as well as two members of the Court of Appeal. Justices Kekewich and Romer in the Chancery Division, and Justices Charles, Williams, Lawrance, Wright and Collins in the Queen's Bench Division, have been appointed in the same period. The President of the Probate, Divorce, and Admiralty Division, Mr. Justice Jeune, as well as his present colleague Mr. Justice Barnes, have also been elevated to the bench during the present administration. The last change to note is the resignation of Lord Justice Fry of the Court of Appeal, and the appointment of Mr. Justice A. L. Smith to the vacancy occasioned thereby. It is possible that Lord Justice Fry, like Lord Hannen, may hereafter assist in the work of the Privy Council.

In Canada, where all the members of legislative bodies are paid, we have a check upon members running away from their duties before the end of the session by the deduction prescribed by law for each day's absence. In the

Dominion Legislature a deduction of eight dollars per day is made from the total indemnity allowed for the session. In England members are not paid, and the attendance is usually very thin in the closing weeks of Parliament. "This falling-off in attendance at such a period as the present," the *Law Journal* observes, is no new thing, as is shown by the still unrepealed 6 Hen. VIII, c. 16. We there read that 'comenly in the end of every Parliament dyvers and many grete and weyghty matters, aswell touchyng the pleasure, wele, and suertie of oure soveraigne lord the King as the common wele of this his realme ar to be treatyd and concluded,' yet that 'dyvers knyghtis of shires, &c., before the end of the seid Parliament depart.' It is, therefore, enacted that 'none of the said knyghtis, &c., who shall be elected to any Parliament, absent hym selff frome the same tyll the same Parliament be fully fynisshid, endyd, or progyd, except he or they so departyng have lycens of the speaker and commons in the same Parliament assembled.' This enactment is very plain and stringent, but, from the nature of the penalty attached to disobedience, it would seem to be a mere *brutum fulmen*. For the penalty is that any member of Parliament departing in contravention of it shall 'lose all thos somes of money whiche he shuld or ought to have hadd for his or their wages, and that all the counties, cities, and buroughes whereof any suche person shalbe electyd, and the inhabitaunts of the same shall be clerely dyschargyd of all the seyd wages ayenst the seid persons and their executours for evermore.' But the Act is not without importance as recognising that right of members of Parliament to payment which has never been formally abolished, though no member of Parliament has received payment for 230 years, Andrew Marvell having been the last paid member."

The English Court of Appeal, in *Alexander v. Jenkins*, May 28, 1882, decided a question of considerable interest on the law of slander. The plaintiff was a member of

the town council of the city of Salisbury. He claimed damages on the ground that the defendant had charged him with drunkenness. The defence was, *inter alia*, that in the absence of special damage the action was not maintainable, and this defence was overruled by Grantham, J., in the Court below. But the judgment has been unanimously reversed by Lord Herschell and Lords Justices Lindley and Kay in the Court of Appeal, who held unanimously that where a slanderous imputation is made concerning a person holding office, if the office is one not of profit, but of credit or honor, and the imputation is not one of misconduct in that office, but merely of unfitness for it, no action of slander will lie against the defendant in the absence of proof of special damage, unless the misconduct imputed, if true, is such as would render the plaintiff liable to be removed from or deprived of that office.

SUPREME COURT OF CANADA.

May 3, 1892.

Quebec.]

CONTROVERTED ELECTION OF L'ASSOMPTION.

Election appeal—Discontinuance—Effect of—Practice—Certificate of Registrar—New writ.

By a judgment of the Superior Court in the controverted election for the electoral district of L'Assomption, the respondent was unseated by reason of corrupt acts committed by agents, and the respondent having appealed to the Supreme Court the case was inscribed for hearing for the May sessions of 1892. When the appeal was called, no one appearing for the appellant, counsel for respondent stated that he had been served by appellant's solicitor with a notice of discontinuance.

Held, that the appeal be struck off the list of appeals.

The notice of discontinuance having been filed in the Registrar's Office, the Registrar certified to the Speaker of the House of Commons that by reason of such discontinuance the decision of the trial judges and their report, were and are left unaffected by the proceedings taken in the Supreme Court. The Speaker

subsequently issued a new writ for the Electoral district of l'Assomption.

Appeal discontinued.

Code for appellant.

Quebec.]

May 3, 1892.

CONTROVERTED ELECTIONS OF BAGOT AND ROUVILLE.

Election petition—Judgment voiding election—Trial—Commencement of—Six months—Sec. 32, R.S.C.—Consent to reversal of judgment—R.S.C., ch. 135, sec. 52.

In these two cases the trials were commenced on the 22nd of December, 1891, more than six months after the filing of the petition, and subject to the objection taken by the respondents that the Court had no jurisdiction, more than six months having elapsed since the filing of the petition, and no order made enlarging the time for the commencement of the trial, the respondents consented that their elections be voided by reason of corrupt acts committed by their agents without their knowledge.

On appeal to the Supreme Court upon the question of jurisdiction, the petitioner's counsel signed and filed a consent to the reversal of the judgment appealed from without costs, admitting that the objection was well taken.

Held, that upon the filing of an affidavit, as to the facts stated in the respondent's consent, the appeals should be allowed and the election petitions dismissed without costs. R.S.C., ch. 135, sec. 52.

Appeals allowed without costs.

Bagot case :

Ferguson, Q.C., for appellant.

Belcourt for respondent.

Rouville case :

Belcourt for appellant.

Code for respondent.

Quebec.]

May 2, 1892.

HATHAWAY v. CHAPLIN.

*Letter of guarantee by bank—Claim for loss—Proof of claim—
Account sales.*

H. *et al.*, upon receipt of an order by telegram from the Exchange Bank to load cattle on a steamer for M. S. with guarantee against loss, shipped, three days after the suspension of the bank, some cattle and consigned them to their own agent at Liverpool. Subsequently they filed a claim with the liquidators of the bank for an alleged loss of \$7,965 on the shipments, and the claim being contested the only witness they adduced at the trial was one of their employees who knew nothing personally about what the cattle realised, but put in account sales received by mail as evidence of loss.

Held, affirming the judgment of the Court below (M.L.R., 7 Q. B. 317) that assuming that there was a valid guarantee given by the bank, upon which the Court did not express any opinion, the evidence as to the alleged loss was insufficient to entitle H. *et al.* to recover.

Per Taschereau, J.—That the guarantee was subject to a delivery of the cattle to M. S., and that H. *et al.* having shipped the cattle in their own name could not recover on the guarantee.

Appeal dismissed with costs.

Laflamme, Q.C., and *Brown*, for appellant.

Macmaster, Q.C., and *Greenshields, Q. C.*, for respondent.

Exchequer.]

May 2, 1892.

MORIN v. THE QUEEN.

*Government railway—43 Vic., c. 8, Construction of—Damage to
farm from overflow of water—Negligence—Boundary ditches—
Maintenance of.*

Held, affirming the judgment of the Exchequer Court, that under 43 Vic., c. 8, confirming the agreement of sale by the Grand Trunk Railway Company to the Crown of the purchase of the Rivière-du-Loup branch of their railway, the Crown cannot be held liable for damages caused from the accumulation of sur-

face water to land crossed by the railway since 1879, unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear by the evidence relied on, to have been caused through the non-maintenance of the boundary ditches of claimant's farm, which the Crown is under no obligation to repair or keep open, the appellant's claim for damages must be dismissed.

Appeal dismissed with costs.

Belcourt for appellant.

Hogg, Q.C., for respondent.

Exchequer.]

May 2, 1892.

HUMPHREY v. THE QUEEN.

Contract—Carriage of mails—Authority of Postmaster General.

The contract for carriage of mails between St. John, N. B., and Digby, N. S., having expired the P. O. Department advertised for tenders for a temporary service, and H. put in a tender. None of the tenders was accepted, and H. being in Ottawa had an interview with the P. M. G. who verbally agreed to H. performing the service for a time on the terms and conditions of the former contract. H. then, pursuant to directions from the P. M. G., wrote the latter a letter by which he agreed to carry said mails for a period of nine months for the amount paid under the former contract, and subject as usual to cancellation at an earlier period. The amount paid for the service by the former contract was \$10,000 a year and the usual cancellation was on giving six months' notice of the intention to terminate the contract. H. procured the necessary steamers and performed the service for some two months, when he was notified that his agreement with the department was at an end, and the carrying of said mails was transferred to a Government steamer. H. then brought an action against the Government by petition of right, claiming damages for breach of contract.

Held, affirming the decision of the Exchequer Court (2 Ex. C. R. 386) that the P. M. G. had no authority to bind the Crown by a contract for a sum exceeding \$1,000 without the authority of an order in council, and the petition must therefore be dismissed.

Appeal dismissed with costs.

Pugsley, Q.C., Sol. Gen. of New Brunswick, for the appellant.

Hogg, Q.C., for the respondent.

May 2, 1892.

Admiralty.]

CHURCHILL v. MACKAY.—*In re* SHIP QUEBEC.

Power of attorney—Construction—Authority to settle or adjust claim—Right to receive payment.

The ship Quebec was abandoned at sea by her crew and discovered by another vessel, the crew of which stopped up augur holes bored in her and brought her into port. A claim for salvage was made against the owners, and a power of attorney was given by the salvors to one P., authorising him "to bring suit or otherwise settle and adjust any claim which we may have for salvage service," etc. P. arranged with the owners the amount of salvage for the ship, due the salvors, and received payment of the same as well as part of the salvage for the cargo, giving the owners a release of the lien of the salvors on the vessel. P. did not pay the money to the salvors, and the power of attorney was revoked before the balance of the cargo salvage was paid, and this action was brought to recover the full amount.

Held, affirming the decision of the local judge in Admiralty for Nova Scotia, that the authority by the power of attorney to "settle and adjust" the claim did not authorise P. to receive the money, and his release did not prevent plaintiffs from maintaining the action.

Taschereau, J., doubted the jurisdiction of the Court to hear the appeal.

Appeal dismissed with costs.

W. B. Ritchie for the appellants.

McCoy, Q.C., and *Morrison* for the respondents.

May 2, 1892.

Ontario.]

UTTERSON LUMBER Co. v. RENNIE.

Mortgage—Rectification—Property not included—Evidence.

A mortgage was given to R. (respondent) of certain lots of land described by numbers, in front of which was a water lot with a saw mill and machinery thereon. The mortgagors afterwards assigned their property for the benefit of creditors, and it was sold at auction to a number of persons who afterwards became incorporated as the appellant company. After the sale and before the deed was executed in pursuance thereof, the respondent, as he alleges, first

became aware that the mortgage did not cover the saw mill and machinery as had been intended, and he commenced this action and registered a *lis pendens*. On the trial evidence was given of notice to some of the persons forming the company, that respondent so claimed, and the trial judge found that appellants were not *bona fide* purchasers for value without notice, and gave judgment reforming the mortgage as asked. This decision was affirmed by the Court of Appeal.

Held, Gwynne and Patterson, J.J., dissenting, that there was ample evidence to sustain the finding that the mill and machinery were intended to be included in the mortgage and were omitted by mutual mistake, and the appeal should, therefore, be dismissed.

Laidlaw, Q.C., for appellants.

Blackstock and Dickson for respondent.

May 2, 1892.

Ontario.]

GIBBONS v. McDONALD.

*Debtor and creditor—Mortgage—Preference by—Pressure—
R. S. O. (1887), c. 124, s. 2.*

M. was indebted to McD. on certain promissory notes, and wishing to go to Manitoba to live he proposed to give McD. a mortgage on his farm for the amount of the notes and a further advance of money, which was done. McD. had previously demanded payment of the notes. At the time of giving the mortgage M. knew that he was unable to pay his debts in full, but McD. believed him to be solvent. M. afterwards executed an assignment for the general benefit of his creditors, and the assignee brought an action to set aside the mortgage to McD. as being given with intent to defeat, delay or prejudice the other creditors of M.

Held, affirming the decision of the Court of Appeal (18 Ont. App. R. 159), and that of the Divisional Court (19 O. R. 290), that the mortgage having been given as the result of pressure and for a *bona fide* debt, and McD. not having been aware that M. was insolvent, the mortgage was not void. *Molsons Bank v. Halter* (18 Can. S. C. R. 88), and *Stephens v. McArthur* (19 Can. S. C. R. 446) followed.

Appeal dismissed with costs.

Garrow, Q.C., for the appellant.

Lash, Q.C., and *McDonald, Q.C.*, for the respondents.

May 2, 1892.

Ontario.]

KINGSTON AND BATH ROAD CO. v. CAMPBELL.

Negligence—Liability of Road Company—Collector of tolls—Lessee.

C. brought an action against the Kingston and Bath Road Company for injuries sustained from falling over a chain used to fasten a toll-gate on the company's road. On the trial the following facts were proved. The toll-house extended to the edge of the highway, and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain which was generally carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell, sustaining the injuries for which the action was brought.

The toll collector was made a defendant to the action but did not enter a defence. It was shown that he had made an agreement with the company to pay a fixed sum for the privilege of collecting the tolls for a year, and was not to account for the receipts. The company claimed that he was lessee of the tolls and that they were not responsible for his acts. It was proved, however, that in using the chain to fasten the gate as he did he was only following the practice that had existed for some years previously and doing as he had been directed by the company. The statute under which the company was incorporated contained no express authority for leasing the tolls, but uses the term "renter" in one section, and in another speaks of a "lease or contract" for collecting the tolls.

The company claimed, also, that C. had no right to use the board walk in walking along the highway, and her being there was contributory negligence on her part, which relieved them from liability for the accident.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence; that whether the toll collector was servant of the company or lessee of the tolls, the company was liable for his acts, and even if they would not be liable in case he was regarded as lessee, the previous improper use of the chain would make them so.

Britton, Q.C., for the appellants.

Lyon for the respondent.

May 2, 1892.

Ontario.]

DUGGAN v. LONDON AND CANADIAN LOAN CO.

Stock—Shares assigned in trust.—Duty of transferee to make inquiry.

D. transferred to brokers as security for a loan and for margins in stock speculations, 180 shares of valuable stock, the transfer expressing on its face that the stock was assigned "In trust." The brokers afterwards pledged this and other stock with a bank in security for an advance, and from time to time transferred the loan to other banks and monetary institutions, the various transfers of D.'s stock retaining the original form, namely, that of being "in trust." The brokers finally arranged a loan for a large amount with the L. & C. L. Co. to whom the stock was transferred by the then holders, the Federal Bank, by an assignment which was signed "B., Manager in trust," B. being the manager of the Federal Bank. D. tendered to the London & Canadian Loan Co. the amount of his indebtedness to the brokers and demanded his stock, which the company refused to re-transfer except upon payment of their advance to the brokers. D. then brought an action to compel the company to re-assign his stock to him.

Held, reversing the decision of the Court of Appeal (18 Ont. App. R. 305), and restoring that of the trial judge (19 O. R. 272), Taschereau and Patterson, JJ., dissenting, that the Company was put upon enquiry by the form of the transfer to it, as to the nature of the trust, and not having made such enquiry, could only hold the stock subject to payment by D. of his indebtedness to the brokers. *Sweeny v. Bank of Montreal* (12 Can. S. C. R. 661; 12 App. Cas. 617) followed.

Held, per Taschereau and Patterson, JJ., that the form of the transfer to the company signed "B., Manager in trust," only indicated that B. held the stock in trust for his bank and that an inquiry as to the nature of the trust was not obligatory on the company, even if the same would have been possible in view of the shares not being numbered or otherwise identified so that they could be traced.

Appeal allowed with costs.

McCarthy, Q.C., and *Kerr, Q.C.*, for the appellant.

E. Blake, Q.C., and *Howland* for the respondents.

May 2, 1892.

Nova Scotia.]

PEERS v. ELLIOTT.

Practice—Trial—Charge to jury—Misdirection—New trial—Negligence.

P., a farmer, having a quantity of hay on his farm, agreed with E. to have it pressed by his (E's) steam engine, and in the course of the work the barn of P. was set on fire by sparks, as he alleged, from the engine, and was burned with its contents. P. brought an action to recover damages for his said loss, alleging negligence against E. both in the construction and management of the engine. On the trial the main issue was whether or not the spark arrester, which it was shown E. possessed in connection with the engine, was in its place when the fire occurred, and the judge directed the jury that if there was no spark arrester that in itself would be such evidence of negligence as would entitle plaintiff to recover. A verdict was given for plaintiff, which the full Court set aside for misdirection by the trial judge in so charging the jury.

Held, that the judge had misdirected the jury in telling them that the want of a spark arrester was negligence in point of law, and it could not be said that the jury were not influenced by it in giving their verdict. A new trial was therefore properly granted.

Appeal dismissed with costs.

Dickie, Q.C., for the appellant.

W. B. Ritchie for the respondent.

May 2, 1892.

New Brunswick.]

ST. JOHN v. CHRISTIE.

Municipal corporation—Control over streets—Duty to repair—Transferred powers—Negligence—Notice of action—Defence of want of—34 V., c. 11 (N. B.), 25 V., c. 16 (N. B.)

The act incorporating the town of Portland [34 V., c. 11 (N. B).] gives the town council the exclusive management of and control over the streets, and power to pass by-laws for making, repairing, etc., the same. By s. 84 the provisions of 25 V., c. 16 and amending acts relating to highways, apply to said town, and the powers, authorities, rights, privileges and immunities vested

in commissioners and surveyors of roads in said town are declared to be vested in the council. By another act no action could be brought against a commissioner of roads unless within three months after the act committed and on one month's previous notice in writing. The town of Portland afterwards became the city of Portland, subject to the said provisions, and eventually a part of the city of St. John.

An action was brought against the city of Portland by C. for injuries sustained by stepping on a rotten plank on a sidewalk in said city and breaking his leg. No notice of action was given by C. The jury on the trial found that the broken plank was within the line of the street, and that the council, by conduct, had invited the public to use said sidewalk. After Portland became part of St. John the latter city became defendant in the case for subsequent proceedings.

Held, Strong, J., dissenting, that the city was liable to C. for the injuries so sustained.

Held, per Ritchie, C.J., that if notice of action was necessary the want of it could not be relied on as a defence without being pleaded, which was not done.

Per Taschereau, Gwynne and Patterson, JJ., that notice was not necessary; the liability of the city did not depend on sec. 84 of 34 V., c. 11, but on the sections making it the duty of the council to keep the streets in repair; that the only powers and authorities vested in commissioners and surveyors of roads were those relating to the performance of statute labor, and the section was unnecessary.

Per Strong, J., that one of the privileges or immunities declared to be vested in the council was that of not being subject to an action without prior notice, and no notice having been given in this case C. could not recover.

Jack, Q.C., for appellants.

Pugsley for respondent.

May 2, 1892.

Manitoba.]

McMICKEN v. ONTARIO BANK.

Deed—Rectification—Absolute in form, but intended to be a mortgage—Evidence of intention—Character of.

A. M. conveyed to G. M. certain lands under lease to the Ontario Bank, and on September 1st, 1877, G. M. conveyed said lands to

plaintiff, wife of A. M., but the deed was not registered until October 1st. On September 17th, G. M. executed a mortgage of the lands to the bank which filed a bill against G. M. to foreclose said mortgage; but a year later, when about to issue the final decree of foreclosure, they for the first time became aware of the transfer to the plaintiff, and they abandoned the foreclosure proceedings and filed a new bill against the plaintiff. As the lease of the premises to the bank would expire before they could obtain possession of the land in this last mentioned suit, negotiations were had with plaintiff as a result of which she and her husband executed an absolute deed of the land to the bank, which is the deed sought to be impeached in this suit.

Plaintiff brought a suit to have it declared that the said deed was only intended to operate as a mortgage, and asked to be allowed to redeem and to have an account of the profits. The evidence on the hearing showed that A. M., plaintiff's husband, was indebted to the bank in the sum of \$12,700 and G. M. also owed the bank as surety for A. M. The consideration of the deed was the extinguishment of these debts. Plaintiff claimed, however, that there was a parol agreement that the deed should only have the effect of a mortgage, and that the bank took the lands in trust to sell and pay off these claims and return her the surplus. The bank claimed that the transaction was a final transfer of the lands to extinguish the two debts and nothing more.

The trial judge, Mr. Justice Dubuc, held that plaintiff had not given evidence sufficient to justify him in granting her the relief she claimed, and dismissed the bill. Plaintiff obtained a re-hearing before the Chief Justice and Dubuc, J., (Bain and Killam, JJ., having been engaged in the case while at the bar) who affirmed the previous decision. On appeal to the Supreme Court of Canada:

Held, that to induce the Court to grant the relief asked for in this case the evidence of intention that the deed was to operate as a mortgage only must be of the clearest, most conclusive and unquestionable character, and plaintiff having failed to produce such evidence her bill was rightly dismissed.

Appeal dismissed with costs.

Haegel, Q.C., and *Kennedy, Q.C.*, for appellants.

McCarthy, Q.C., and *Richards* for respondents.

May 2, 1892.

British Columbia.]

NEW WESTMINSTER v. BRIGHOUSE.

Municipal corporation—Repair of streets—Excavation—Injury to adjoining land—By-law—Expropriation—Land injuriously affected—51 V., c. 42, s. 190 (B. C.)

A by-law authorised the corporation of the city of New Westminster, B. C., to raise money for the purpose of making repairs on certain streets, but there was no by-law expressly authorising such repairs, which were, however, proceeded with. One of the streets named in said by-law was excavated to lower the grade, in the execution of which work the soil of an adjoining lot fell into the excavation and the supports of the buildings thereon became weakened. The owner of such adjoining lot brought an action against the corporation for the damages occasioned to his land by such excavation.

By the act of incorporation of the city, 51 V., c. 42 (B. C.), s. 190, the council may, by by-law, order the opening or extending of streets, etc., and purchase, acquire, take and enter into any lands required therefor, either by private contract or by complying with certain formalities prescribed by said sec. 190. The said formalities are set out in subsecs. 3 and 4 of that section, providing for the appointment of commissioners to value the land to be taken. By subsec. 14, the report of the commissioners is to be submitted to the Supreme Court or a judge thereof, or a County Court judge, for confirmation, and by subsec. 15 the council of the city is to deposit with the registrar or clerk of the Court the value fixed by such report, such deposit constituting a legal title in the city to the land.

Subsec. 17 of said sec. 190 extends subsecs. 3 and 4 to all cases in which it shall become necessary to ascertain the amount of compensation to be paid to any owner of land for damage sustained by reason of any alteration made by order of the council in the line of level of any street, etc., and the amount of such compensation is to be paid at once without further formality.

Held, affirming the decision of the Supreme Court of British Columbia, Ritchie, C. J., and Taschereau J., dissenting, that subsec. 17 of sec. 190 only applies to lands injuriously affected by work on the streets and not to land taken or used for the purposes of such work; and that in order to acquire, take or use lands for such purpose, the council must be authorised by by-law

and comply with the formalities prescribed by subsecs. 3, 4, 14 and 15 of said section; that the soil of plaintiff's lot having fallen into the excavation made in the street, it must be regarded as lands taken and used for the purposes of such excavation equally as it would have been if the street had been elevated so as to cover a portion of the adjoining land; that the corporation had, therefore, taken and used plaintiff's land without complying with the conditions precedent therefor prescribed, and were liable to the plaintiff in an action for the damage he had sustained.

Held, further, that excavating the street to such a depth as to cause the soil of the adjoining lot to fall into the excavation was such negligence in the execution of the work as to make the corporation liable.

Appeal dismissed with costs.

Robinson, Q.C., for the appellants.

Osler, Q.C., for the respondent.

INSOLVENT NOTICES.

Quebec Official Gazette, June 18 and 25.

Judicial Abandonments.

DEMERS, Harrison A. (Demers & Co.,) Montreal, June 8.

LANGLOIS, L. O. Hector, parish of St. Hugues, June 11.

LAVALLEE, Ernest Narcisse, St. Phillippe de Néri, Kamouraska, June 23.

Curators appointed.

DEMERS, Harrison A. (Demers & Co.).—C. Desmarteau, Montreal, curator, June 20.

DESAULNIERS & LEBLANC, Montreal.—Kent & Turcotte, Montreal, joint curator, June 14.

GUILBAULT *et al.*, Ed.—C. Desmarteau, Montreal, curator, June 8.

LABOCHELLE, Léon, St. Henri.—H. A. Bedard, Quebec, curator, June 15.

LEBOUX & Co., Imbleau, Montreal.—Kent & Turcotte, Montreal, joint curator, June 14.

PAYETTE & Fils, A., Montreal.—Kent & Turcotte, Montreal, joint curator, June 13.

Dividends.

BOURGOING, François, Tadoussac.—Third dividend, payable July 11, N. Matte, Quebec, curator.

DECHENE & Co., F. M.—First and final dividend, payable July 6, G. H. Burroughs, Quebec, curator.

GAGNON, Nérée.—First and final dividend, payable July 11, F. Valentine, Three Rivers, curator.

GOURDEAU, F.—Dividend on proceeds of immovables, payable July 13, D. Arcand, Quebec, curator.

HUBBELL & Brown, leather merchants, Montreal.—First and final dividend, payable July 12, A. F. Riddell, Montreal, curator.

KINSELLA, Amelia.—First and final dividend, payable July 13, G. H. Burroughs, Quebec, curator.

LEBOUTILLIER & Co., John, Gaspé Basin.—First dividend, payable July 4, N. Matte, Quebec, curator.

LESSARD, F. X., Montreal.—First and final dividend, payable July 13, D. Seath, Montreal, curator.

METHOT, L. P., Fraserville.—First and final dividend, payable July 13, D. Seath, Montreal, curator.

RACICOT, C. E.—First and final dividend, payable June 29, Bilodeau & Renaud, Montreal, joint curator.

TROTTIER, J. E., Normandin.—First and final dividend, payable July 12, H. A. Bedard, Quebec, curator.

GENERAL NOTES.

UNFORGIVEN FOR DOING HIS DUTY.—There was a dramatic scene at the funeral of Richard S. Jenkins, ex-prosecutor of the Pleas of Camden County, N. J. As friends and acquaintances gathered around to take a last look at the great lawyer's face, an elderly man, soberly dressed, passed and repassed the coffin several times, each time exclaiming in a tone loud enough to be heard by those who stood near: "I can never forgive him." This was repeated until the coffin was closed and the remains were removed. Inquiry brought to light the fact that the man was the brother of Benjamin Hunter, who was hanged in Camden in 1879 for the murder of John Armstrong. The crime was one of the most cruel in the annals of murder, the guilty man even tearing away the bandages from his victim's wounds while pretending to nurse him as a friend. Hunter had been associated with Armstrong in business, and the murder was for gain. Hunter was an active and conspicuous leader in church and Sunday-school work, and his high character shielded him from suspicion for a time. Jenkins however hunted him down, effected his conviction and he was hanged. Before his death he confessed his crime.

THE LEGAL NEWS.

VOL. XV.

JULY 16, 1892.

No. 14.

THE ACTION UNDER ART. 1056, C. C.

The Judicial Committee of the Privy Council has reversed the judgment of the Supreme Court of Canada in *Robinson v. C. P. R. Co.*, referred to at page 67. The reasons of judgment have not yet been received, but it is understood that their lordships were strongly of opinion that the view entertained by the majority of the Supreme Court, viz., that Art. 1056, C. C., gives the widow, or other relatives therein mentioned, a right of action only when at the death of the injured person there was a subsisting right of action, which, had death not ensued, he himself might have exercised, was untenable. This decision was generally anticipated, as their lordships would hardly have granted special leave to appeal in such a case unless they had felt grave doubts as to the soundness of the conclusion arrived at by the majority of the Supreme Court. As it is, the judgment accords both with the text of our Code and the intention of the enactment.

The question of the right of the defendants to a new trial on the ground of excessive damages was not pronounced upon by the Supreme Court, and the Judicial Committee expressly excluded the consideration of this question from the appeal. The defendants have the right, if they see fit, to go back to the Supreme Court on the

question of damages, but as the verdict has been maintained by two courts, an interference with it at this stage would be unusual and probably ineffective.

THE CRIMINAL CODE.

The session of the House of Commons, which has just come to an end, is chiefly remarkable, in a legal point of view, for the passage of the Criminal Codification Bill. The House of Commons gave great attention to this measure, and although it came before the Senate at a late period of the session, that body was induced by the leader of the Government, Sir J. J. C. Abbott, himself a veteran lawyer, to give it the necessary impetus to make it law. Sir J. J. C. Abbott met the objection of some of the members of the Senate, that the English Bill of 1880, on which this Code is based, had not been pressed, by stating that "the bill has not been pressed forward as a whole, but parts of it have become law from year to year, and now a large portion of that Bill has become incorporated into the law in that country. We find it better in this country to place the whole thing before the House at once, as one connected whole, and to make a Code of it." The Senate accepted this suggestion, and after making some useful amendments, the Bill was finally passed.

NEW PUBLICATIONS.

THE INSURANCE CORPORATIONS ACT, 1892, with practical notes and appendices. By Wm. Howard Hunter, B. A., Barrister-at-Law, with an introductory chapter by J. Howard Hunter, M.A., Barrister-at-Law.—Publishers: The Carswell Co., Toronto, 1892.

The passage of the *Insurance Corporations Bill* through the legislature of Ontario, last session, renders the appearance of this publication seasonable. The work, of course, is designed mainly for the use of the profession in Ontario, but it will be of service to lawyers in the other provinces, who may be called upon to advise clients

upon questions arising upon the law of insurance in that province. The provincial legislatures have exclusive jurisdiction in insurance matters, and the province of Ontario has been the most active in settling conditions of policies, and otherwise regulating the contract of insurance. It would seem that these laws have not been universally recognized. Now, however, the *Insurance Corporations Act* requires of every organization that undertakes insurance, in any form whatsoever, to be registered in the Provincial Department of Insurance, and to renew its registry from year to year. As one of the incidents of registration the applicant files his forms of contract as exhibits annexed to his sworn application; and he must, as may from time to time be required, exhibit his forms of contract then in actual use. The observance or non-observance of provincial law is thus directly ascertainable. The work is evidently prepared with much care, and is issued in the handsome form of the Carswell Co. publications.

SUPREME COURT OF CANADA.

OTTAWA, June 2, 1892.

Quebec.]

FLATT V. FERLAND.

Fraudulent conveyance—Action to set aside by a creditor—Amount in controversy—Appeal—Jurisdiction—R. S. C. ch. 135, s. 29.

In December, 1889, F., a trader, sold to G., respondent, certain real estate in Montreal which was mortgaged for \$7,000, for \$8,000 with a right of *reméré* for one year.

In January, 1890, F. made an assignment, and I. F. *et al.*, creditors of F. in the sum of \$1,880, brought an action against G. to have the deed of sale of the property (which was valued at over \$11,000) set aside as made in fraud of his creditors. G. pleaded that he was willing to return the property upon payment of the sum of \$1,000 which he had advanced to F., and the courts below dismissed F. *et al.*'s action. On appeal to the Supreme Court of Canada:

Held, that as the appellants' claim was under \$2,000 and that they did not represent F.'s creditors, the amount in controversy

was insufficient to make the case appealable. R. S. C. ch. 135, s. 29.

Appeal quashed with costs.

Belcourt for respondents.

Brosseau for appellants.

Quebec.]

OTTAWA, May 9, 1892.

PONTIAC CONTROVERTED ELECTION.

Election Petition—Judgment—R.S.C., c. 9, s. 43—Enlargement of time for commencement of trial—R.S.C. c. 9, s. 33—Notice of Trial—Shorthand Writer's Notes—Appeal—R.S.C. c. 9, s. 50 (b).

In the Pontiac election case the judgment appealed from did not contain any special findings of fact or any statement that any of the 20,000 charges mentioned in the particulars were found proved, but stated generally that corrupt acts had been committed by the respondent's agents without his knowledge, and declared that he had not been duly elected, and that the election was void. On an appeal to the Supreme Court on the ground that the judgment was too general and vague :

Held, that the general finding that corrupt acts had been proved was a sufficient compliance with the terms of the Statute 49 Vic. c. 9, s. 43.

On the 10th October, 1891, the judge in this case, within six months after the filing of the election petition by order enlarged the time for the commencement of the trial to the 4th November, the six months expiring on the 18th October. On the 19th October, another order was made by the judge fixing the date of the trial for the 4th November, 1891, and the respondent objected to the jurisdiction of the Court.

Held, that the orders made were valid, ss. 31, 38, ch. 9, R.S.C.

Held, also, 1, that the objection to the insufficiency of the notice of trial given in this case under sec. 31 of ch. 9, R.S.C., was not an objection which could be relied on in an appeal under sec. 50 (b) of ch. 9, R.S.C.

2. That evidence taken by a shorthand writer not an official stenographer of the Court, but who has been sworn and appointed by the judge, need not be read over to the witnesses when extended.

O'Gara, Q. C., & Aylen, for appellant.

MacDougall, for respondent.

(Quebec.)

OTTAWA, June 2, 1892.

THE CORPORATION OF THE TOWN OF LEVIS V. THE QUEEN.*Expropriation of Land — Value of land taken — Award by Exchequer Court Judge—Appeal.*

The Supreme Court will not interfere with the award of the Judge of the Exchequer Court as to the value of land expropriated for railway purposes, where there is evidence to support his finding and such finding is not clearly erroneous.

Appeal dismissed with costs.

Bethune, Q.C., for appellants.

Angers, Q.C., for respondent.

Nova Scotia.]

OTTAWA, May 2, 1892.

MUNICIPALITY OF LUNENBURG *et al.* V. THE ATTORNEY GENERAL OF NOVA SCOTIA.*Municipal Corporations—Maintenance of County Buildings—Establishment of County Court House and gaol—Right to remove from Shire Town.*

The County of Lunenburg, N.S., contains the municipality of C. and the town of L. which are corporations separate and distinct from the municipality of the county. L. is the shire town of the county and contains the County Court House and gaol, and the sittings of the Supreme Court for the county are required to be held there. By R. S. N. S. 5th ser. c. 20, s. 1, as amended by 49 Vic. c. 11, "County or district gaols, court houses and session houses may be established, erected and repaired by order of the Municipal Councils in the respective municipalities."

In 1891 an act was passed by the legislature of Nova Scotia, empowering the municipality of L. to borrow money for the purpose of erecting and furnishing a court house and gaol in the county or repairing and improving the present court house. The municipality of C. and the town of L. were respectively to contribute towards payment of this loan. The municipality by resolution, proposed to erect the said buildings in B., another town in the county, and an injunction was granted by the Supreme Court restraining the municipal council from erecting a court house for the general purposes of the county at B., or

from expending in such erection any funds in which the municipality of C. and the town of L., or either of them, were interested. On appeal from the judgment granting said injunction :

Held, that without legislative authority the court house and gaol for the purposes of the county could only be situated at the shire town; that the authority in the municipal council to establish these buildings did not allow their erection in any other place which would, in effect, repeal and annul the acts of the legislature providing for their establishment in L. the shire town; and that the injunction was properly issued and must be maintained.

Appeal dismissed with costs.

W. B. Ritchie for the appellants.

Russell, Q.C., for the respondent.

Nova Scotia.]

OTTAWA, May 2, 1892.

PEOPLE'S BANK OF HALIFAX v. JOHNSON.

Contract—Consideration—Stifling prosecution.

L. was a member of the firm of H. & A. L., doing business at Lockport, N. S., and also local agent of a bank in that town. As such agent he had embezzled the bank's money and the cashier of the bank obtained a bond from J., whose adopted daughter was the wife of L., agreeing to pay the bank the indebtedness of the firm. In an action against J. on said bond, the defence was that it had been given in consequence of threats by the cashier to prosecute L. for the embezzlement, and was therefore void.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the evidence established that the only consideration for the bond was to prevent the prosecution, and such consideration being illegal the bond was void.

Appeal dismissed with costs.

Ross, Q.C., for appellant.

Drysdale for respondent.

Nova Scotia.]

OTTAWA, May 2, 1892.

CITY OF HALIFAX v. LORDLY.

Municipal Corporation—Duty to light streets—Liability for negligence—Obstruction on sidewalk—Position of hydrant.

L. was walking along the sidewalk of a street in Halifax at

night when an electric lamp went out, and in the darkness she fell over a hydrant and was injured. In an action against the city for damages, it was shown that there was a space of seven or eight feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant and accustomed to walk on said street. The statutes respecting the government of the city do not oblige the council to keep the streets lighted, but authorize them to enter into contracts for that purpose. At the time of this accident the city was lighted by electricity, by a company who had contracted with the corporation therefor. Evidence was given to show that it was not possible to prevent a single lamp or a batch of lamps going out at times.

Held, reversing the judgment of the court below, Strong and Taschereau, JJ., dissenting, that the city was not liable; that the corporation being under no statutory duty to light the streets, the relation between it and the contractors was not that of master and servant or principal and agent, but that of employer and independent contractors, and the corporation was not liable for negligence in the performance of the service; that the position of the hydrant was not in itself evidence of negligence in the corporation; and that L. could have avoided the accident by the exercise of reasonable care.

MacCoy, Q.C., for the appellants.

Drysdale for the respondent.

Nova Scotia.]

OTTAWA, May 10, 1892.

In re CAHAN.

Appeal—Jurisdiction—Security for costs—Final judgment.

C. applied to the Supreme Court of Nova Scotia to be admitted an attorney of said court, presenting to the court a certificate from the President of the Dalhousie Law School of his having taken the degree of LL.B. at said school, and claiming that the act of the Nova Scotia Legislature, 54 Vic. c. 22, which made certain provisions respecting the admission of graduates of the law school to the bar of the province, had done away, so far as such graduates were concerned, with certain conditions required to be performed by persons desiring admission to practice law. The Supreme Court held, that graduates of the law school were

still obliged to perform these conditions, and refused the application. C. sought to appeal to the Supreme Court, but gave no security for the costs of such appeal, his application not having been opposed and there being no person to whom such security could be given.

Held, Gwynne, J., doubting, that the court had no jurisdiction to hear the appeal.

Per Ritchie, C. J., and Taschereau, J., that giving security for costs is a condition precedent to every appeal to this court, and without it the court has no jurisdiction.

Per Strong, J., that it was never intended that the Supreme Court should interfere in matters relating to the admission of attorneys and barristers in the different provinces, and on that ground the appeal would not lie.

Per Taschereau and Patterson, JJ., that the judgment sought to be appealed from was not a final judgment within the meaning of the Supreme Court Act.

Appeal quashed.

Russell, Q.C., for appellant.

New Brunswick.]

OTTAWA, May 16, 1892.

AYR AMERICAN PLOW CO. V. WALLACE.

*Promissory Note—Form of—Indorsement by party not named—
Liability as maker.*

The agent of the plaintiff company required security from a customer for goods sold, and went with the customer to the office of W. who was proposed as such security. W. agreed to become security, and was proceeding to write out promissory notes for the customer to sign, when the agent requested the notes to be drawn on a form supplied to him by his principals, which was done, the customer signing such notes of which the plaintiff company were payees. W. wrote his name across the back. The notes were not paid, and no notice of dishonor was given to W., but an action was brought against him and the customer as joint makers. On the trial the agent swore that he never asked the customer for an indorser but only for security; that he was accustomed to take joint notes in such cases; and that he supposed he was getting joint notes in this case. W. swore that he was asked to indorse and only intended to indorse. A non-suit

was entered, with leave reserved to plaintiffs to move for judgment, "if there is any evidence that should be left to the jury as to W.'s liability." The motion for judgment was refused.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the evidence showed that W. only intended to become indorser of the notes, and there was no evidence to go to the jury of his intention to be a maker. The nonsuit was right therefore, and should be maintained.

Appeal dismissed with costs.

Earle, Q.C., for appellants.

Currey for respondent.

New Brunswick.]

OTTAWA, May 16, 1892.

SCOTT V. THE BANK OF NEW BRUNSWICK.

Appeal — New trial — Verdict against weight of evidence — Interference with.

S. brought an action against the bank to recover money deposited on a special receipt, and the defence to the action was that the money had been paid to an agent of S. On the trial S. swore that after he got the deposit receipt from the bank he handed it to one R. for safe keeping while he was at sea, and that he had never indorsed it. It was shown that some time after R. presented the receipt at the bank with the name of S. indorsed thereon, and obtained the amount of the deposit with interest. When S. returned he found that R. had so used the receipt, and he afterwards took from him a mortgage for a larger amount than his deposit with the bank. The jury found that the name of S. was forged to the receipt, and that the mortgage given to S. did not include the amount claimed from the bank. A verdict was given for S., which was set aside as being against the weight of evidence, and a new trial was granted, from which S. appealed.

Held, that the Supreme Court would not interfere with the order for a new trial granted on the ground that the verdict was against the weight of evidence.

Appeal dismissed with costs.

Palmer, Q.C., for appellant.

Barker, Q.C., for respondent.

Ontario.]

OTTAWA, June 17, 1892.

McGUGAN v. SMITH.

Contract—Agreement for service—Specific performance—Remuneration for services—Quantum meruit.

S. with the consent of her parents went to live with her grandfather when she was eleven years old, and some three years after, the grandfather agreed that if she would remain with him until he died, or until her marriage, he would provide for her by his will as amply as for any of his daughters. She lived with him until she was twenty-five, when she was married, performing all the time such services as tending cattle, cleaning out stables, breaking in unmanageable horses, doing field work and other things usually done by a man. About a year after her marriage her grandfather died leaving her by his will \$400, a sum much less than his daughters received. She brought an action against the executors of the estate for specific performance of the said agreement, or in the alternative for wages for the time she worked for the testator.

Held, affirming the judgment of the Court of Appeal, that S. was entitled to payment for her services, and that \$1,000 was a reasonable amount to remunerate her therefor, and she was entitled to judgment for that amount which was to include the \$400 left to her by the will.

Held also, that the agreement made with S. by her grandfather was not one of which the Court would decree specific performance.

Appeal dismissed with costs.

James A. Glenn for appellant.

John A. Robinson for respondent.

Ontario.]

OTTAWA, June 20, 1892.

McGUGAN v. McGUGAN.

Appeal—Jurisdiction—Proceeding originating before Judge in Chambers—Right to tax costs—Party chargeable—Ratepayer—R. S. O. (1887) c. 147, s. 43.

By R.S.O. (1887), c. 147, s. 43, any person who not being chargeable as the principal party is liable to pay or has paid any bill of costs to the solicitor in an action is entitled to apply for

an order of taxation of such bill, and such application may be made to a county court judge, or a judge of the High Court, in Chambers. M., a ratepayer of a township, applied to a judge of the High Court for an order to tax a bill against the Town Council. His application was refused, and he appealed to the Divisional Court where the order for taxation was made. An appeal was taken to the Court of Appeal where the judgment of the Divisional Court was reversed, and M. sought to appeal to the Supreme Court.

Held, that the appeal could not be entertained.

Per Ritchie, C. J., and Strong, J. Even if the court has jurisdiction to hear this appeal and that it was not a matter of discretion in the Court of Appeal to hear it or not, we should not interfere in a matter of taxation of costs. Moreover, on the merits the ratepayer was not a person entitled to an order for taxation.

Per Taschereau, J. The judgment sought to be appealed from is not a final judgment under the Supreme Court Act, it was a matter of discretion for the Court of Appeal to entertain the appeal from the Divisional Court or not; and the proceedings did not originate in a superior Court. For all these reasons the appeal should be quashed.

Per Gwynne, J. Whether we have jurisdiction to hear the appeal or not the matter is one in which this Court should not interfere.

Per Patterson, J. The order in this case was one which the Court had a discretion to make or refuse, and so it is not appealable to this Court.

Appeal dismissed with costs.

Riddell & Robinson for appellants.

Glenn for respondents.

LEGISLATION OF LAST SESSION.

The following Act, 55-56 Vict., ch. 43, to amend certain provisions of the Code of Civil Procedure respecting abandonment of property, was passed at the last session of the Quebec legislature, and assented to June 24, 1892:—

1. Article 763a of the Code of Civil Procedure, as added by Article 5953 of the Revised Statutes of the province of Quebec, is amended, by adding thereto the following words:

“A claim under oath accompanied by vouchers must be produced at the offices of the Prothonotary with this demand.

If the demand has been served upon a woman who is a trader, and it is not complied with, proceedings may be had under Article 780 for the appointment of a guardian and curator.

The debtor, upon whom such demand of assignment has been made, shall, without delay, deposit at the place, where by law the assignment should take place, a declaration that he consents to abandon all his property to his creditors and file his statement within the three days following such demand."

2. Article 764 of the said code, as contained in Article 5954 of the said Revised Statutes, is amended by replacing the first two lines by the words "The statement shall be sworn to by the debtor and shall show."

3. Article 768 of the said code, as contained in Article 5956 of the said Revised Statutes, is amended by replacing the words "Immediately after the filing of the statement" in the first line, by the words "Immediately after the filing of the statement or of the simple declaration made in virtue of Article 763a as amended."

4. The said Article 768 is further amended, by adding the following words, at the end of the third clause, "as well as one or more inspectors," and by striking out the two clauses before the last clause and replacing them by the following :

"A meeting of the creditors is called before the Court or the judge, by a notice forwarded to each of them by registered letter and inserted in a public newspaper in the district, or in a neighbouring district, if there be none in the district.

Such meeting shall be held between the fifth and fifteenth days after the publication and sending of the notice calling the same.

The Court or the judge shall name the curator and the inspectors, chosen by the majority in number and in value of the creditors present or represented at such meeting, and who have produced a sworn claim. If the majority in number does not agree with the majority in value, the Court or the judge shall decide between the two as he thinks proper."

5. The following article is added after Article 772 of the said Code :

"772b. The Court, the judge or the prothonotary, in the absence of the judge, upon the application of the inspectors or of a creditor, may order that the debtor, his manager, his employees, his or her husband or wife, as the case may be, be examined under oath touching his statement and the position of his affairs, and if the person summoned refuses to appear or to answer, he

shall be deemed to be in contempt of Court and treated accordingly."

6. The first paragraph of Article 773 of the said code is replaced by the following:

"The curator, with the consent of the inspectors, or any creditor, may contest the deed of assignment by reason."

INSOLVENT NOTICES.

Quebec Official Gazette, July 2 & 9.

Judicial Abandonments.

CARDINAL, Emilie (widow of Olivier Rochette), Quebec, July 7.

DAY & De Blois, founders, Montreal, June 24.

VANCOR, Geo. W., pump manufacturer, Knowlton, June 22.

Curators appointed.

DAY & DE BLOIS.—John Hyde, Montreal, curator, July 2.

GALLAGHER, Francis.—Millier & Griffith, Sherbrooke, joint curator, July 4.

GIBOUX, Isaie.—Millier & Griffith, Sherbrooke, joint curator, July 4.

GRAVES, Reginald (Graves & Rolin).—Fulton & Richards, Montreal, joint curator, June 28.

LANDRY, Delphin E., Mont Joli.—T. Tardif, Quebec, curator, June 30.

LANGLOIS, L. O. Hector, St. Hugues.—J. O. Dion, St. Hyacinthe, curator, June 28.

LEMIEUX, Hubert.—A. Lemieux, Levis, curator, June 30.

VANCOR, George W.—J. E. Fay, Knowlton, curator, July 4.

Dividends.

ARMSTRONG, Archibald.—Amended and final dividend, payable July 26, Millier & Griffith, Sherbrooke, joint curator.

DUBOCHER, J. B., hotel-keeper, Montreal.—Second and final dividend, payable July 28, C. Desmarteau, Montreal, curator.

HEARLE, James G., Montreal.—First and final dividend, payable July 20, W. A. Caldwell, Montreal, curator.

KNAPTON, Joseph H., Bedford.—First dividend (15 c.), payable July 26, J. McD. Hains, Montreal, curator.

- LEMAY, J. N. F., St. Côme.—First and final dividend, payable July 19, H. A. Bedard, Quebec, curator.
- MONTREAL CIGAR ASSOCIATION.—First and final dividend, payable July 27, C. Desmarteau, Montreal, curator.
- MORIN, J., Montreal.—First dividend, payable July 29, Kent & Turcotte, Montreal, joint curator.
- NAUD, F. X.—Second and final dividend, payable July 27, G. H. Burroughs, Quebec, curator.
- PATERSON *et al.*, John A.—First dividend, payable July 19, A. W. Stevenson, Montreal, curator.
- POIRIER, Joseph, St. Alexis.—First and final dividend, payable July 26, H. A. Bedard, Quebec, curator.
- RENÉ, J. H.—First and final dividend, July 25, F. Valentine, Three Rivers, curator.
- THIBAUDEAU, Honoré, Stanfold.—First and final dividend, payable July 26, H. A. Bedard, Quebec, curator.
- WALTON, J. G.—First and final dividend, payable July 17, E. F. Waterhouse, Sherbrooke, curator.

GENERAL NOTES.

THE CANADIAN CRIMINAL CODE.—The Home Secretary, in answer to a question in the House of Commons, recently declined to bring in any bill to amend the common law definition of murder. In connection with this subject attention may be drawn to the elaborate definitions proposed in the exhaustive bill relating to the criminal law of Canada which was laid before the Parliament of that colony last year. Clause 222 provides that 'culpable homicide is murder (1) if the offender means to cause the death of the person killed, or (2) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not, or (3) if the offender means to cause death, or being so reckless as aforesaid means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed, or (4) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired

that his object should be effected without hurting anyone. There is also a further definition of murder in clause 223 whereby culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue: (a) if he means to inflict grievous bodily harm for the purpose of facilitating the commission of treason, rape, robbery, and other specified offences, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or (b) if he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or (c) if he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath. Another lengthy clause opens with the words that 'Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation,' and proceeds in three elaborate paragraphs to define 'provocation.' It is evident that very great pains have been spent on the bill, and if it should pass the Canadian Parliament, there seems no reason why its definitions of murder should not be adopted here.—*Law Journal (London)*.

AN OLD POLICY.—Mr. A. F. BurrIDGE, the actuary of the Equitable Life Assurance Society (of London), writes as follows: 'It is, and has always been, the custom of this society to pay the full reserve value on surrender of a policy, even though only one premium has been paid. It may be worth while adding that we have recently quoted the surrender value of the oldest policy existing in the society, and as the figures are so remarkable—probably unparalleled—they may be worth publication: Policy No. —, effected on July 24, 1817, for 1,300*l.* on a life then aged nine. Sum assured and bonuses at present time, 6,181*l.* 5*s.*; cash surrender value at present time, 5,369*l.* 6*s.* Annual premium, 24*l.* 8*s.* 6*d.*; total premiums paid, 1,832*l.*' A policy of seventy-five years' duration is a curiosity indeed, but a cash surrender value that is equal to nearly three times the amount of the premiums paid is more so! The above figures, we should think, probably are unparalleled. If any reader can send us anything approaching them, we shall be glad to give publicity to similar instances of what can be done by life offices under favourable circumstances.—*Policy-Holder*.

ATTEMPT TO STEAL.—The recent case of *Regina v. Ring*, 61 Law J. Rep. M. C. 116, established the important point that, if a man tries to pick a pocket, he may be convicted of an attempt to steal without proof that there was anything in the pocket. The contrary had been held in *Regina v. Collins*, 33 Law J. Rep. M. C. 177, decided as long ago as 1864, but that decision was virtually overruled in *Regina v. Brown*, 59 Law J. Rep. M. C. 47. There seems, however, to have been a misapprehension in some quarters, as to the effect of the last named case, and accordingly in *Regina v. Ring* a case raising the point was stated for the consideration of the Court for Crown Cases Reserved. There can be little doubt that the decision of that Court is in accordance with the true principles of justice. Where a person tries to pick the pocket of another, it is obvious that the felonious intention exists whether there is anything in the pocket or not; and it is certainly a startling proposition that a man's guilt or innocence should depend upon whether the pocket is empty or not—a purely accidental circumstance. Under the law as laid down in *Regina v. Collins* it was necessarily impossible to establish the guilt of a prisoner charged with attempting to pick a pocket unless the person whose pocket was attempted could be secured as a witness, which frequently could not be done, owing to the circumstances under which this class of offence usually takes place, and many guilty persons consequently escaped punishment.—*Law Journal (London)*.

JUDICIAL QUALIFICATIONS.—It is said that the Lord Chancellor does not intend in future to appoint men over seventy years of age to the office of County Court judge. This is satisfactory as far as it goes, but we could wish that the limit had been fixed at sixty, as that appears to us to be quite a maximum age for a man to commence a judicial career.—*Law Journal (London)*.

THE LEGAL NEWS.

VOL. XV.

AUGUST 1, 1892.

No. 15.

CURRENT TOPICS AND CASES.

On July 30, the Judicial Committee of the Privy Council affirmed the decision of the Court of Queen's Bench, Montreal, in *Connecticut Fire Insurance Co. & Kavanagh*, M. L. R., 7 Q. B. 323. In this case the defendant Kavanagh, an insurance broker, was the agent in Montreal of two foreign insurance companies, one of which instructed him to cancel a certain risk in Montreal, which he had accepted for the company. After suggesting a reconsideration, and the order being repeated, the defendant complied, and he then immediately transferred the insurance to the other company for which he was agent, without informing them that the risk had been refused by the first company. He made the transfer, moreover, without the knowledge of the insured, and without notice to them. On the same day that the risk was thus transferred from one company to the other, and very shortly after the instruction was given to the clerks in the office, a fire occurred in the premises insured, and the loss was paid by the company to which the risk had been transferred. Action was afterwards brought by the latter company against Kavanagh, to be reimbursed the amount of the loss, which they alleged they had paid without cause, and upon false representations by the agent. Wurtele, J., in the Superior Court, decided (M.

L. R., 5 S. C. 262), that the transfer of the risk from one company to the other having been made by Kavanagh in good faith, before the fire occurred, and in accordance with the custom of insurance brokers in Montreal, he could not be held liable. This decision was unanimously affirmed by the Court of Queen's Bench (Baby, Bossé, JJ., Davidson and Cimon, JJ. *ad hoc*), and after a very full argument before the Judicial Committee the appeal has been dismissed.

The vacancy in the English Queen's Bench Division caused by the promotion of Mr. Justice A. L. Smith to the Court of Appeal (see p. 193), has been filled by the appointment of Mr. Gainsford Bruce, Q.C., who is chiefly known by his labors in the department of legal literature and law reporting. The *London Law Journal* says:—"The careers of other law reporters who have been raised to the bench, Lord Campbell, for example, and Lord Blackburn, whose promotion was so vehemently attacked, as well as the three ex-reporters who are now on the bench, have amply justified their elevation. Mr. Bruce never, we believe, enjoyed a very large practice; but neither did those great judges Lord Blackburn and Lord Justice James."

By chapter 401, A. D. 1890, the State of New York made it a criminal offence for an agent of a life insurance company to pay a rebate as an inducement to insure in his company. The N. Y. Court of Appeals in *Conger v. Treadwell*, March 22, 1892, held that this is not unconstitutional as an abridgment of the natural rights and personal liberty of such agent in the conduct of his business. Life insurance companies (observed Haight, J.) perform very important functions in modern society. "They operate in all parts of the State, and a very large number of people are interested in them. They are resorted to for the purpose of making provision for families and dependents after the death of the insured, and for that pur-

pose many persons invest in them the accumulations of their labor and their thrift. The nature of insurance contracts is such that each person effecting insurance cannot thoroughly protect himself. He is not competent to investigate the condition and solvency of the company in which he insures, and his contracts may run through many years, and mature only, as a rule, at his death. Under such circumstances, it is competent for the legislature, in the interest of the people, and to promote the general welfare, to regulate insurance companies, and the management of their affairs, and to provide by law for that protection to policy-holders which they could not secure for themselves. Under such conditions there should be a wide range of legislative power to promote the public welfare in the exercise of the police power, and the true boundaries of that power it would be difficult in such a case to prescribe It would be quite preposterous to say that the legislature could, in the exercise of its legitimate authority, regulate these corporations, and prescribe the terms under which they may exist and do business, and yet could not by similar laws regulate and control the conduct of their agents. When these corporations seek the benefits and privileges of the laws creating and authorizing them, they must conform to the laws enacted for their conduct, and if they are unwilling to do so, they must go out of existence. So too all persons who seek to act as agents of such corporations must conform to the laws regulating the business of such corporations or cease to act for them."

In a sketch of the Supreme Court of Indiana the *Green Bag* gives some interesting particulars concerning Isaac Blackford who held judicial office from 1817 to 1858, and who is widely known as a reporter of the decisions of his Court, of which he published eight volumes, selected from a large number never reported. At that time volumes of reports were comparatively few in number, and received an amount of attention which in the rapid mul-

tiplication of volumes in the present day is not often observed. Blackford was one of the most painstaking of editors. In some respects he acted with a freedom which perhaps might be resented, for we are informed that he did not hesitate to correct the opinions of his associates, or even to remodel them. He studied the art of punctuation, and read the best books for style. In his opinion a misplaced comma was as inexcusable as a grammatical blunder; and on one occasion an entire signature (sixteen pages) was printed four times before the punctuation suited him. In the printing of the eighth volume the entire printing establishment was delayed three days, at a cost of \$125, until the author had determined the correct spelling of "jenny," a female ass. He had spelled it with a "g," but finding it spelled differently, he was not content to let it pass until he had examined every book in his library. During the year 1843 he paid his printer \$600 for loss of time occasioned by these delays. The publication of the eighth volume covered eighteen months, and he paid his printer \$1,100 for delays and corrections. He had a standing reward with his printer for the discovery of errors; and he kept the sheets of each volume, as it was coming out, in the Supreme Court room, accompanied by a request that all errors be noted on the margin of the page containing the error. Ex-Governor Porter (now minister to Italy) noted an error in the use of the word "optionary." Some months afterwards he was surprised to read in the papers his appointment as Supreme Court Reporter, which had been urged by Judge Blackford solely on the ground of the discovered error.

PENNSYLVANIA SUPREME COURT.

May 23, 1892.

SPALDING V. EWING.

Contracts—Affecting action of public bodies—Public policy.

A contract to pay for professional services in securing additional compensation for defendant as postmaster, where such services consisted in securing special legislation to compel the post-office department to pay a claim which had been rejected, is contrary to public policy and cannot be enforced.

STERRETT, J. This action to recover fees alleged to have been earned by plaintiff is founded on the following contract, signed by defendant: "Landenberg, Pa, 1882. I hereby guarantee that myself, claimant for additional pay as postmaster (at Chandlersville, Landenberg), shall without delay, upon the receipt of draft for amount which may be collected, remit the amount of fee due his attorney, Harvey Spalding, which is understood to be twenty-five per cent of collection, to the said Harvey Spalding at Washington, D. C." The character of the services rendered in pursuance of and doubtless contemplated by this contract will be best understood by referring to plaintiff's deposition given in evidence on the trial. After stating that the power of attorney from defendant was procured by a person employed "to obtain powers of attorney in such cases," and that the postmaster-general had "for years restricted the payment of defendant's claim," etc., the plaintiff testifies as follows: "I applied to Congress for a legislative mandate to compel the postmaster-general to make the necessary readjustments of defendant's salary and the salary of other postmasters, and this application was resisted by the postmaster-general. From session to session of Congress I made application to committees having jurisdiction, urging the enactment of the mandate applied for, and after several years' labor in that behalf I obtained the enactment by Congress on the 3rd of March, 1883, of the mandate applied for, which act is known as the 'Spalding Act,' by reason of my services in that behalf. Afterward the postmaster-general tried to avoid complying with this mandate, and I carried on proceedings which compelled him ultimately, in a degree, to comply with the law. * * * I also made arguments on his behalf before the different committees, when in 1886 the appropriation to pay the first allowance was stricken out of the appropriation bill in the House

of Representatives, and I saw the necessary report was made to Congress of the second allowance, and I took the necessary means to have the appropriations made. The defendant's claim was always resisted by the officers of the post-office department, and by the most laborious and protracted service on behalf of the defendant I compelled the payment of the said claims, notwithstanding such resistance." In his answer to the fifth interrogatory, after again speaking of his long-continued service, the plaintiff says: "It was never possible to collect either of these claims without my said service, for the officers of the post-office department, at every stage of the case, down almost to the time of collection, resisted the payment of the claims." In answering the sixth interrogatory, he further testifies: "That after he had expended time and money for the defendant, and compelled the payment of a claim not otherwise collectible, the defendant has by a variety of misrepresentations tried to cheat witness out of his fees." Plaintiff's son testified, among other things, that his father, "as attorney for Ewing and many others, did secure for them the allowance previously denied, and which, without his aid, they never would or could have secured."

It thus appears by the depositions above referred to that defendant's claim and many similar claims against the post-office department had been considered and rejected. As testified by plaintiff, "the postmaster-general for years resisted defendant's claim." The burden of plaintiff's undertaking appears to have been the procurement of what he terms a "legislative mandate," the avowed object of which was to compel recognition of the claims rejected, and so long resisted, by the post-office department. It is very evident from the uncontradicted testimony of plaintiff and his son that strictly professional services, such as preparing petition to Congress, drafting the necessary bill, furnishing such statement and proofs of said claims as were necessary to a proper understanding of their merits, etc., must have constituted a very significant part of the "several years' labor," "the most laborious and protracted services," the numerous "applications to committees," "from session to session of Congress," etc., testified to by him. According to his own account of it, the work of engineering the bill through Congress, despite the strong and determined opposition of the post-office department, must have been multiform, persistent and so conspicuously effective that plaintiff was honored with the paternity of the "legislative mandate" by calling it the "Spalding Act." The

plaintiff's evidence is not susceptible of any other inference than that, in the main, the services contemplated by the contract in suit, and actually rendered in pursuance thereof, were such as have been repeatedly pronounced contrary to public policy. In *Clippinger v. Hepbaugh*, 5 Watts & S. 315, the condition of the obligation to pay \$100 was that the obligee should succeed in procuring from the Legislature the passage of a law authorizing the obligor and his wife to sell and convey certain real estate devised to the latter and her children. In refusing to sustain the contract this court said: "It is not necessary to say that a certain compensation for such services may not be recovered, but we are clearly of opinion that it would be against sound policy to sanction a practice which may lead to deceit, improper and corrupt tampering with legislative action. It is not required that it tends to corruption. If its effect is to mislead it is decisive against the claim, and that such is its tendency no human being can reasonably doubt. * * * The law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil and political institutions of the State. * * * It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members and the use of extraneous secret influence over an important branch of the government. It may not corrupt all, but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal." The same general principle is recognized in the following cases: *Hatzfield v. Gulden*, 7 Watts, 152; *Bowman v. Coffroth*, 59 Penn. St. 19; *Ormerod v. Dearman*, 100 id. 561. In the last case the present chief justice, referring to the authorities, said they "establish the principle that contracts which have for their subject-matter any interference with the creation of laws, or their due enforcement, are against public policy and therefore void." In *Burke v. Child*, 21 Wall. 441, the validity of a contract to procure the enactment of a law authorizing the payment of a private claim was fully considered by the Supreme Court of the United States. After referring to *Clippinger v. Hepbaugh*, *supra*, and three other American cases, viz., *Harris v. Roof's Ex'rs*, 10 Barb. 489; *Rose v.*

Truax, 21 id. 361; *Marshall v. Railroad Co.*, 16 How. 314, in all of which such contracts were held to be against public policy, that court said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing to a committee or other proper authority and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarkation from personal solicitation, and other means and appliances, such as the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practised by all paid lobbyists in the prosecution of their business." After showing that the prohibition against contracts to procure either general or private legislation rests upon a solid foundation, the court further says: "To legalize the traffic of such services would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility, and a strong incentive to use them. The widespread suspicion that prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased. It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation, where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. We have said that for the professional services in this connection a just compensation may be recovered. But where they are blended and confused with those that are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter

character gratuitously rendered are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists it affects fatally in all its parts the entire body of the contract." The principle under consideration is not restricted to contracts involving the procurement of legislation for a contingent compensation. It has been frequently recognized and applied in other transactions involving questions of public policy. Some of the instructive cases in which that has been done are the following: *Tool Co. v. Norris*, 2 Wall. 48, 56; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 id. 643. In the first of these an agreement for compensation to procure a contract from the government to furnish its supplies, was held to be against public policy and could not be enforced. Mr. Justice Field, delivering the opinion of the court in that case, said: "The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. * * * Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception." As has been seen by reference to plaintiff's testimony, the contract in suit contemplated the procurement of the 'legislative mandate' compelling the post-office department to recognize certain claims which had theretofore been considered and rejected. The procurement of that legislation was the burden of plaintiff's undertaking. He has explained the difficulties encountered in accomplishing it as well as the reasons therefor. The undisputed facts of the case bring it within the principle recognized in the authorities above cited, and defendant's second point should have been affirmed.

Judgment reversed.

CHANCERY DIVISION.

LONDON, June 1, 1892.

Before KKEWICH, J.

VENABLES v. BARING BROTHERS & Co.

Negotiable instrument—American railroad bond—'Boná fide' holder for value.

This was an action by the plaintiff to establish his title to certain American railway bonds. In November, 1883, 105 Six per Cent. First Mortgage Sinking Fund loan bonds of the South and North Alabama Railroad Company, which are guaranteed by the Louisville and Nashville Railroad Company, were stolen from Messrs. Baring Brothers in London. On March 2, 1891, the plaintiff in Paris advanced to Mr. E. Wunder a sum of 50,000 francs on the security of a deposit by Wunder with the plaintiff of twelve of the above-mentioned bonds. It was subsequently discovered that ten of the bonds so deposited were among those stolen in 1883. This action was then brought by the plaintiff against Messrs. Baring and the railroad companies asking for a declaration that he was entitled to the bonds. The bonds were to bearer, but contained a provision entitling the holder to the benefit of a collateral mortgage vested in trustees. The defence was that the bonds were not negotiable instruments, and that the plaintiff had notice of the robbery, and, owing to his negligence, was not entitled to relief.

KKEWICH, J., held that the bonds were negotiable instruments according to the law merchant, and that at the date of the advance the plaintiff had no knowledge that the ten bonds were stolen. In his lordship's opinion the plaintiff had not conducted the transaction in such a way as to deprive him of his rights. There must, therefore, be a declaration that the plaintiff was entitled to the bonds as against the defendants, and the defendants must pay the costs of the action.

RECENT UNITED STATES DECISIONS.

Religious societies—Incorporation—Notice—Withdrawal of faction.—Where there are two factions in a church, each claiming to be the true church, and entitled to the enjoyment of its temporalities, the members of one faction, by keeping up a separate organization, holding separate services under another pastor, and supporting only their own organization, do not thereby with-

draw from the church but are still members, and an incorporation by them upon due notice to the other faction is an incorporation of the entire church, and serves to invest the corporation with the legal title to the church property. *West Koshkonong Congregation v. Ottesen* (Wis.), 49 N. W. Rep. 26, followed. Wisconsin Supreme Ct., Feb. 23, 1892. *Holm v. Holm*.

Insurance—Life—Application—False statements—Where an application of insurance, which is made a part of the policy, stipulates that the answers to the questions propounded are warranted by the insured to be true, and that the rights of the insured shall be forfeited if any untrue or false statements are made, the policy is avoided by a false answer to the question whether the insured had ever been rejected by any other life insurance company. March 15, 1892. *Clemens v. Supreme Assembly Royal Society of Good Fellows*. 16 N. Y. Supp. 378, mem., reversed.

Criminal law—False pretences—Obtaining board by fraud.—The trial court ought to have directed the jury to acquit defendant on the evidence, which shows that she registered at the Southern Hotel, July 29, 1891, and was assigned to a room. On July 31 she sent for the manager of the hotel, and rented a room as a studio, stating she was an artist, and inquired as to the time of payment of bills, and stated "that it would be inconvenient for her to pay at the end of a week, for the reason that she expected a remittance, which would come to her at the end of two weeks, and she wanted to know if she couldn't arrange so that she might pay at the end of two weeks." The manager assented to this, and she asked him if the check which she was to receive would be accepted in payment for her board. He told her it would. He did not ask her nor did she tell him the name of the person from whom she expected the remittance. The bill for board was made out at the end of two weeks. She wrote a note saying it would be paid next day without fail; that her remittance had not come as she expected, but thought it would certainly be there that evening. The remittance did not come, and failing to pay her board she was in two or three days excluded from her room, and was not thereafter permitted to get meals at the hotel. During her stay there she had taken to her studio paint materials and easels worth about \$30, and left a picture partly painted on canvas, which with her trunk were retained by those in charge of the hotel. This is substantially the evi-

dence as to the *corpus delicti*, and it wholly fails to prove that defendant obtained board "by means of a trick or deception, or false or fraudulent representation, statement or pretence." She certainly was guilty of no trick by means of which she obtained the board. Her statement that she was an artist was true, and her statement that she expected a remittance in two weeks was not proved to be false, and if it had been it would have been insufficient to justify a verdict of guilty of the crime charged. Speaking of this crime Judge Adams, in *State v. Evers*, 49 Mo. 542, says: "The essence of the crime of obtaining money or property by false pretences is that the false pretence should be of a past event, or of a fact having a present existence, and not of something to happen in the future." And this doctrine was reasserted by this court in *State v. DeLay*, 93 Mo. 95. But not only must the false pretence or representation be of a past event or an existing fact, but the board must be obtained by means of it. It must be made for the purpose of obtaining the board, and the hotel or boarding-housekeeper must believe it and in reliance on it furnish the board. See the *Evers* and *DeLay* Cases above cited. We do not think it can be fairly inferred from the evidence that defendant in this case stated to the manager of the Southern Hotel that she expected a remittance for the purpose of obtaining board. She registered at the hotel on July 29, and without being questioned or making any statement she was assigned a room. In this manner she obtained board in the first instance. On July 31 she sent for the manager, and upon inquiry she was informed that bills for board were payable weekly. She replied that she could not pay till the end of two weeks at which time she expected a remittance. It appears therefore that she got board for two days, and she could have continued there for one week at least, without saying a word about payment of the bills. Persons intending to perpetrate tricks, or obtain money, property or other valuable thing by means of a false pretence, do not ordinarily proceed in this way. They usually defer their false statements till they are forced to the wall. Here defendant made the statements voluntarily. She said she expected a remittance. She testified she did expect it, and there was no evidence whatever that she did not. But conceding that this statement was false, *i. e.*, she did not expect a remittance, still she did not obtain the board by means of it, for it is perfectly manifest from the evidence that the manager of the hotel did not rely on it when he consented to extend the time of payment of her

board bill. It is inconceivable that an ordinary business man would give credit on the faith of such a statement without inquiring who the party is who is to make the remittance, and that is what the manager of the hotel in this case did. Hence all the elements of the crime charged against defendant are lacking. Her representation, if false at all, was of a future event, and the manager of the hotel did not credit her for board on the faith of it.—Missouri Supreme Court, Feb. 2, 1892. *State v. Kingsley*.

THE LATE LORD BRAMWELL.

Of the late Lord Bramwell, whose death was recently noticed, the English legal journals speak in terms of highest praise. The *Law Journal* says:—"Lord Bramwell will be universally regretted by the profession and the public. After a judicial career of the unprecedented length of thirty-six years (for though he nominally retired in 1881, his honorary services in the House of Lords were so constant and continuous that he may be said to have died a judge) he has literally died in harness, being cut off at the age of eighty-three, within a very short period after the delivery of his latest judgment. As a specialist he was both the best criminal lawyer and the best commercial lawyer of his day (an unexampled combination of excellences), while his judgments on all points that came before him were distinguished by a rare good sense and independence of view, for he frequently differed from his colleagues. He was proud, but justly proud of his legal knowledge. Perhaps he leaned a little too much to the legal as distinguished from the equitable view of a question, and was a little too quick to see the weak points of a plaintiff when a railway company happened to be defendants. But he has left a good and indelible mark on English law."

The *Law Times* has the following:—"The late Lord Bramwell, best known to the public as Baron Bramwell—to the bar as "Brammy"—was one of the ablest and the most popular of English judges of any generation. We have before said that we hesitate to inquire into the precise qualifications which go to make clever, able and great men. But we unhesitatingly put the late lord among the category of England's best and greatest judges. Mr. George Meredith, in one of his recent works of fiction, says that immortality consists in what we do, not in what we are. This applies with great force to judges. A judge, against

whose moral character no breath has ever been whispered, who has trained his intellect with all the power of his nature, and acquired all the knowledge within his reach, and devoted both his intellect and knowledge to the administration of justice, with the one intent that it shall flow pure, free and strong from the fountains of an ancient and uncorrupted jurisprudence; who always regarded the judicial office as a public trust, his official time the public time, his deliverances from the judgment-seat as utterances for which he must account here and hereafter; who has regulated his judicial conduct and demeanor by the consciousness that he sets an example to all mankind; who has not cringed to the influential, nor sneered at nor oppressed the weak; and who, in the days of technical subtlety, aimed to make law the embodiment of justice and common sense—when all this can be said of a man, shall it be denied that he was a great judge? Yes, it might be. It is necessary to add that his grasp of legal principles was only equalled by his mastery of fact, and that for both he was distinguished. And we thus complete the portrait of Lord Bramwell, both a great and a good judge. We agree with some biographers that Lord Bramwell found the greatest scope for his great gifts when presiding at *Nisi Prius*. He had a keen insight into human nature; he knew its weakness, its foibles and its faults. Humbug had no chance before him. Sharp practice to him was almost a criminal offence. He did what few judges succeed in doing—he put before juries his view of a case without appearing to take a side, and we think most judges fail to realize how largely this qualification is necessary to make the public satisfied with trial by jury. Further, we conceive that Lord Justice Bramwell, presiding over the Court of Appeal shone almost as much as Baron Bramwell at *Nisi Prius*. He used to sit with Lord Justice Brett (Lord Esher) on one side, and Lord Justice Mellish on the other. He supplemented the somewhat academic narrowness of the latter, and restrained the impetuosity of the former, thus constituting the court an almost ideal tribunal. And practising before him came such men as Edward James, Holker, Benjamin and Herschell. His one partiality, if so it may be called, was supposed to consist of a leaning in favor of railway companies. He believed them to be largely victimized. And so they are. But it was felt that they had a better chance before Baron Bramwell than before other judges, which sentiment we are sure he would have been the first to deprecate. It would have been well, we think, had his retire-

ment from the bench ended his career. His best work was not done as a peer of Parliament, and his newspaper controversies with all sorts of people upon all sorts of subjects did not lend weight to his character as a hereditary legislator or a judicial peer. He remained to the last however a favorite with the profession, and his fame will endure among the best traditions of the law."

The *Solicitors' Journal* observes:—"The *Times* is right in saying that while there have been, and probably will be, even greater lawyers than Lord Bramwell, English law has never had, and perhaps never again will have, a representative cast in his unique mould. Absolute mastery of the common law, combined with a keen and subtle intellect, controlled by the most vigorous common sense, made up a personality seldom seen on our bench. And it may be added that never was a judge more popular with the legal profession. The reasons for this cannot be better expressed than they were by one who knew him well, and who, writing in this journal at the time of his retirement from the bench, said: 'No doubt those who knew him most can best appreciate the ascendancy of his personal qualities, but no one acquainted with the business of the courts can have failed to notice the unvarying candor with which he more than appreciated every argument raised before him which had even the semblance of reason in it, and rejected it only after having set it in a more persuasive form than the advocate; the depth and subtlety with which he tracked the fundamental principles, the practical results, and the legal analogies involved in the matters brought before him for decision; the frankness with which he admitted ignorance and accepted information on points where a mind less sure of itself might be tempted to affect knowledge; the moral vigor and broad good sense with which he pushed aside all fringe, subterfuge and evasion; and, perhaps above all, the mingled strength and kindness with which he administered the difficult and anxious duties of a criminal judge.' A judicial career of five and twenty years, in which these qualities were displayed, sufficiently explains the profound respect in which Lord Bramwell was held by every lawyer."

INSOLVENT NOTICES.

Quebec Official Gazette, July 16 & 23.

Judicial Abandonments.

CHAYER, Ferdinand W., restaurant keeper, Montreal, July 14.

GAGNON, Antoine, trader, parish of N. D. de Liesse, July 2.

LANGLAIS, J. A., stationer, Quebec, July 13.

MORRISSETTE, Eusèbe, trader, Three Rivers, July 18.

PARKER, Simon H., boot and shoe dealer, Montreal, July 11.

Curators appointed.

AUGER, A. J.—G. H. Burroughs, Quebec, curator, July 22.

LAVALLEE, E. N., St. Philippe de Neri.—H. A. Bedard, Quebec, curator, July 19.

PARKER, Simon H.—C. Desmarteau, Montreal, curator, July 19.

Dividends.

BEDARD, John C., Richmond.—First and final dividend, payable Aug. 3, Royer & Burrage, Sherbrooke, joint curator.

CADIEUX, Joseph.—First and final dividend, payable Aug. 17, D. Parizeau, Montreal, curator.

CAMPEAU, Evangeliste, hotel-keeper, Ste. Marthe.—First and final dividend, payable Aug. 3, C. Desmarteau, Montreal, curator.

DERICK, Lyman H., Noyan.—Second and final dividend, payable Aug. 2, J. McD. Hains, Montreal, curator.

DIONNE, J. M., St. Antoine.—First dividend, payable Aug. 2, H. A. Bedard, Quebec, curator.

DUFRESNE, Raoul.—First dividend, payable Aug. 10, Kent & Turcotte, Montreal, joint curator.

MACFARLANE, J. D., North Star Mine.—First and final dividend, payable Aug. 2, J. McD. Hains, Montreal, curator.

MILETTE, F. A., Windsor Mills.—First and final dividend, payable Aug. 3, Royer & Burrage, Sherbrooke, joint curator.

PAQUET, Wm., Quebec.—First and final dividend, payable Aug. 2, H. A. Bedard, Quebec, curator.

RITCHOT, F. X.—Dividend, on proceeds of immovables, payable Aug. 10, C. Desmarteau, Montreal, curator.

THE LEGAL NEWS.

VOL. XV.

AUGUST 16, 1892.

No. 16.

TESTAMENTARY CAPACITY.

It is not proposed to offer any abstract discussion on this subject, but merely to say a few words suggested by the opinion of the General term of the Supreme Court in "*Matter of the Will of Fricke*." The principles it lays down are, of course, not new, but there seems to be a perennial necessity for their re-statement. We have been much impressed at different times by the dread average laymen have of will contests. Many hesitate to make wills, because of fear of their being "broken," and a large part of the estate consumed in lawyer's fees.

Will contests are apt to be conspicuous litigations, involving a great deal of the emotional element, and thereby securing newspaper notoriety. It is, of course, true that several wills offered for probate in this county during recent years, and purporting to pass large estates, have been contested by relatives of the testators; and many, even among intelligent laymen, do not stop to recall that most of such contests proved futile. The Tilden will case is not in point, as no doubt as to testamentary capacity was raised, and the litigation over it involved questions purely of law.

As a matter of fact, how few wills in proportion to the number offered for probate are contested, and what a small ratio of the contests are successful! That a will was drawn and witnessed by a reputable attorney is *prima facie* a strong argument in favor of testamentary capacity. A lawyer, of course, may be deceived by latent mental defects, but certainly a practitioner of conscience and standing cannot afford to become a promoter of

what purports to be a testamentary act on the part of an obvious incompetent. The opinion of the General Term in the Fricke matter attaches much weight to the testimony of the attorney who officiated at the execution of the will.

The attestation by professional men, either lawyers or doctors, of good character, is, therefore, presumptively a guaranty that the testator was mentally capable of executing and publishing the instrument. And this consideration suggests the prudence of having the testator's regular medical adviser, as well as the attorney drawing the will, sign as witnesses (unless, indeed, the latter be named as executor), if it be feared that opposition will be made to the probate.

The superstitious antipathy to will-making on the part of laymen finds its natural correlative in the prevailing persuasion that any will may be broken if distasteful to the heirs or next of kin. On this subject conscientious lawyers are obliged to reiterate many times in the course of a year certain legal truisms: There is no obligation, either of arbitrary law or implied contract, for the owner of property, real or personal, to devise or bequeath it to his blood relatives, or any of them.

A testator in possession of his faculties may do what he pleases with his own, save only that he cannot defeat his wife's dower in real estate, and that he must respect certain statutory prohibitions against charitable gifts and the creation of perpetuities. Undue influence does not consist in mere argument or persuasion, but in such personal ascendancy that the purpose and desire of the influencing party are substituted for those of the testator. Aphorisms might be multiplied, but the average lawyer can frame them for himself at his leisure. The truth is that a goodly percentage of will contests on the facts are without legitimate hope of success.

We do not feel called upon to decide for everybody the question of professional ethics arising when a testator has made an "unnatural" will, and a contest is proposed as a means of compelling a settlement. Legal questions as to the construction of wills are, of course, matters of legitimate controversy for practitioners. But we do believe that, on the whole, members of the bar are not as chary as they ought to be in advising contests, and that the prejudices and passions of clients are often humored when professional duty would require an uncompromising veto.

—*New York Law Journal*.

CROSS-EXAMINATION—A SOCRATIC FRAGMENT.

Socrates. Shall we not be right in saying then that the object of cross-examining witnesses is to elicit the truth?

Philotimus. It would seem to be so, Socrates.

Soc. Then the good advocate, aiming at this mark, will ask only such questions as will help to discover the truth?

Phil. Only such questions, Socrates.

Soc. How shall we reconcile this with what we arrived at before, that it is the function of the judge to find out the truth, and not the function of the advocate?

Phil. This is a hard nut to crack, Socrates.

Soc. Have we not then been confusing two different kinds of excellence, that of the judge and that of the advocate, just as if we were to confuse the excellence of the terrier and the excellence of the rat?

Phil. We seem to have been guilty of some such mistake, Socrates.

Soc. Let us consider then what is the special excellence of the advocate. Will it not be to recommend himself to his client so that he may obtain more briefs, and become popular among litigious people?

Phil. This seems very probable, Socrates.

Soc. Then will not the advocate who proposes this end to himself try, if he has a bad case, to make the worse appear the better reason, and to hoodwink the jury, and to browbeat and bully the witnesses and do other things of this kind, if he sees that they please his employer and procure him special retainers?

Phil. This is likely enough, Socrates.

Soc. And if he sees a witness timid and nervous he will speak to him in a loud voice and try to frighten him, and will treat him roughly as if he was speaking lies?

Phil. We shall not be far wrong, Socrates, in expecting this.

Soc. And if he knows anything to the disadvantage of the witness he will rake it up, will he not, however old it may be, and whether it has anything to do with the matter in question or not; as if a witness is called to prove a will he will ask him whether he did not once steal apples when he was a boy, and if he knows nothing, he will suggest things which are not true and make innuendoes and insinuations?

Phil. This seems his best course, Socrates.

Soc. And if the judge interferes or remonstrates he will insult him as far as he dares, or make slighting remarks in an undertone, to make his employer think that he is master in the court and more knowing than the judge?

Phil. I should advise him to act so, if he would listen to me.

Soc. And thus he will get the reputation of a verdict-winner, and will be talked about in the newspapers, will he not, and will receive retainers and refreshers continually?

Phil. No doubt, Socrates.

Soc. While the unskillful advocate who asks only relevant questions and is courteous to witnesses and respectful to the judge will be neglected and his fee-book will suffer?

Phil. Assuredly, Socrates.

Soc. We seem to have arrived at this then, that law is in the nature of a cock-fight, and that the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs?

Phil. It would be madness not to do so, Socrates.

Soc. And to know the law and the true principles of justice will be a matter of secondary importance?

Phil. Altogether secondary.

Soc. So that we may say that the law is a matter of clever rhetoric and of bullying witnesses and cajoling juries and other such arts, may we not?

Phil. Apparently.

Soc. Then how shall we reconcile this with the saying of one of the greatest of the wise men, that "law ought to be the leading science in every well-ordered Commonwealth?"

Phil. We are in a fix, Socrates.

Soc. May we not have been wrong in saying that the special excellence of the advocate is to advertise himself and make himself popular with solicitors?

Phil. I am inclined to think that we must hark back, Socrates.

Edward Mansm in "Law Quarterly Review."

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, Aug. 6, 1892.

Present: LORD HOBHOUSE, LORD HERSCHELL, LORD MACNAGHTEN,
and LORD MORRIS.

WALKER v. BAIRD et al.

*International law—Prerogative of Crown—Act of State—Personal
responsibility of agent of Crown.*

This was an appeal from a judgment of the Supreme Court of Newfoundland (see 14 Leg. News, 300) given in favor of the respondents, Messrs. Jas. Baird and Edward Leroux, on certain questions of law in an action brought by them against the appellant, Captain Sir Baldwin W. Walker, R.N., of her Majesty's ship *Emerald*, for wrongfully entering, on June 25, 1890, the respondents' premises, situated at Fishell's river, in Bay St. George, in Newfoundland, and taking possession of their lobster factory and the materials therein, and preventing the respondents from carrying on the business of catching and preserving lobsters.

The Attorney-General, Mr. Staveley Hill, Q.C., and Mr. A. T. Lawrence, were counsel for the appellant; Sir James S. Winter, Q.C. (of the Newfoundland Bar); Mr. J. E. C. Munro and Mr. T. Arnold Herbert for the respondents.

The arguments were heard on July 19 and 20 before a committee consisting of Lord Watson, Lord Hobhouse, Lord Herschell, Lord Macnaghten, Lord Morris, Lord Hannen, Sir Richard Couch and Lord Shand, when judgment was reserved.

LORD HERSCHELL, in now delivering their lordships' judgment, said :

This is an appeal from an order of the Supreme Court of Newfoundland. The respondents, by their statement of claim, alleged that the appellant wrongfully entered their messuage and premises, and took possession of their lobster factory and of the gear and implements therein, and kept possession of the same for a long time, and prevented the respondents from carrying on the business of catching and preserving lobsters at their factory. By his statement of defence, the appellant said that he was captain of Her Majesty's ship *Emerald* and the senior officer of the ships of Her Majesty the Queen employed during the current season on the Newfoundland fisheries; that to him, as such senior officer and captain, was committed by the Lords Commissioners

of the Admiralty, by command of Her Majesty, the care and charge of putting in force and giving effect to an agreement embodied in a *modus vivendi* for the lobster fishing in Newfoundland during the said season, which, as an act and matter of State and public policy, had been by Her Majesty entered into with the Government of the Republic of France ; that the said agreement provided, amongst other things, that, on the coasts of Newfoundland, where the French enjoy rights of fishing conferred by the treaties, no lobster factories which were not in operation on July 1, 1889, should be permitted, unless by the joint consent of the commanders of the British and French naval stations ; that the said lobster factory of the plaintiffs, being situate on the said part of the coasts of Newfoundland, and being one that was not in operation on the said 1st of July, 1889, and one which was without the consent aforesaid, being used and worked by the plaintiffs as a lobster factory whilst the said agreement was in force, and, such use and working thereof being prohibited by the said agreement and in contravention of its terms, the defendant in performance of his duties did for the cause assigned enter into and take possession of the messuage and premises in the statement of claim mentioned, and of certain gear and implements ; that such entry into and taking possession of the said messuage and premises, gear and implements were made and done by the defendant in his public political capacity, and in exercise of the powers and authorities, and in performance of the duties committed to him, and were acts and matters of State done and performed under the provisions of the said *modus vivendi* ; that the action taken by the defendant in putting in force the provisions of the said *modus vivendi* had, with full knowledge of all the circumstances and events, been approved and confirmed by Her Majesty as such act and matter of State and public policy, and as being in accordance with the instructions of Her Majesty's Government. The defendant submitted that the matters set forth in his answer to the statement of claim, and on which he rested his right to enter and take possession of the premises, were acts and matters of State arising out of the political relations between Her Majesty the Queen and the Government of the Republic of France ; that they involved the construction of treaties and of the said *modus vivendi* and other acts of State, and were matters which could not be enquired into by the court. The plaintiffs objected that the defence did not set forth any answer or ground of defence to the action, and it was ordered by the court that the

points of law should be first disposed of. The Supreme Court of Newfoundland, after hearing argument, held that the statement of defence disclosed no answer to the plaintiffs' claim, but gave the defendant leave to amend. In their Lordships' opinion this judgment was clearly right, unless the defendant's acts can be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign power. The suggestion that they can be justified as acts of State, or that the court was not competent to enquire into a matter involving the construction of treaties and other acts of State, is wholly untenable. The learned Attorney-General, who argued the case before their Lordships on behalf of appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of the treaty. The proposition he contended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace; that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether, if so, it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorized otherwise than by the Legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended. Their Lordships will, therefore, humbly advise her Majesty that the appeal should be dismissed with costs.

COURT OF APPEAL.

LONDON, Aug. 1, 1892.

Coram LINDLEY, LOPES, SMITH, L. JJ.

SCOTT V. BROWN.—SLAUGHTER V. BROWN, (27 L.J. N.C. 122).

Conspiracy — Illegal agreement — Company — Shares — Market — Agreement to buy shares in order to create a market.

These were actions for the rescission of contracts to purchase shares in the Steam Loop Company, upon the ground, amongst others, that the defendants, whilst acting as brokers, had passed off their own shares to the plaintiffs instead of buying them upon the market. WRIGHT, J., held that there was no evidence to go to a jury, and the plaintiffs applied for a new trial. At the time when the transactions occurred the company had not yet been brought out. Scott was interested in floating it, and Slaughter was the solicitor of the company. Both plaintiffs instructed the defendants to purchase for them shares in the company, and duly paid for these shares. In the course of the hearing of the appeal it appeared that the plaintiffs had agreed with the defendants to buy the shares, and had actually taken them at a premium in order to induce would-be buyers of shares in the company to believe that there was a market for A's shares, and that the shares were of greater value than they really were.

Their LORDSHIPS took the preliminary objection that this was an agreement to cheat the public; that an agreement by two or more to do an illegal act, and to do it by illegal means, had been proved; that an indictable conspiracy had been committed and had been brought to the notice of the Court, although it was not pleaded; and that the plaintiffs were not entitled to any relief.

Appeal dismissed with costs.

QUEEN'S BENCH DIVISION.

LONDON, Aug. 8, 1892.

HOSKINS V. CORFIELD (27 L.J. N.C. 131.)

Action of deceit—Statement made recklessly and without belief in its truth—Evidence of fraud—Nonsuit—New trial.

This was an appeal from the decision of the County Court judge of Clerkenwell nonsuiting the plaintiff in an action tried before him with a jury, and in which the plaintiff claimed damages for misrepresentation as to the sanitary condition of the

drainage of certain premises let by the plaintiff to the defendant.

On the facts before him the learned County Court judge was of opinion that there was evidence that the statement made by the defendant was untrue, and that it was made without reasonable ground for believing it to be true, but that there was no evidence to go to the jury that such statement was dishonestly made; and, therefore, on the authority of *Derry v. Peek*, 58 Law J. Rep. Chanc. 864; L. R. 14 App. Cas. 337, and *Glasier v. Rolls*, 58 Law J. Rep. Chanc. 820; L. R. 42 Chanc. Div. 436, nonsuited the plaintiff.

From this decision the plaintiff appealed.

Ritter for the appellant: The learned County Court judge's decision is based on a misconception of *Derry v. Peek* (*supra*), which, although it was therein held that the plaintiff must prove actual fraud, decided that fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false; and here the defendant made the statement without knowing anything about the property.

Kinniple (*Crawford* with him), for the respondent, contended there was no evidence of fraud [WRIGHT, J.: On the judge's notes, isn't there evidence of fraud?]; at any rate, the plaintiff must prove affirmatively that the defendant made the statement dishonestly. Cited *Glasier v. Rolls* (*supra*) and *Angus v. Clifford*, 60 Law J. Rep. Chanc. 443; L. R. (1891) 2 Chanc. 449.

The COURT (WRIGHT, J. and BRUCE, J.) held that there was evidence of fraud to go to the jury, as the statement by the defendant was made recklessly and without belief in its truth, and, therefore, ordered a new trial.

Appeal allowed.

STOCK EXCHANGE TRANSACTIONS.

'Ex turpi causâ non oritur actio' is a maxim that seems to have been lost sight of by the plaintiffs in *Scott v. Brown & Co., Slaughter v. Brown & Co.*, 27 L. J. N. C. 122. At any rate, it remained for the Court of Appeal to demonstrate the turpitude of the negotiations upon which those actions were based. And that such proceedings do involve violation of the law, and are, in consequence, absolutely void, will, doubtless, come as a disagreeable surprise to a good many of the Stock Exchange fraternity and others who 'operate' within the purlieus of Capel

Court. But they will learn from the decision in those cases that the Court declines to lend its assistance to a person to enforce a demand originating in a breach of legal principles. Shortly stated, the decision comes to this: that a contract to rig the market on the Stock Exchange is an illegal conspiracy, and the Court will not give effect to rights acquired thereunder by the parties to such contract. The cant phrase to 'rig the market' has, unfortunately, become only too familiar of late, and is one of the numerous evils that attend speculation on the Stock Exchange. As a witty writer puts it in a recently published novel, 'the rigging of companies' shares, before and after allotment, would give thimble-rigging odds, and win easy.'

The facts of the two cases would lie in a nutshell. Scott, the plaintiff in the first action, was interested in floating a certain company, and Slaughter, the plaintiff in the second action, was the solicitor of that company. Both plaintiffs instructed the defendants, who were stockbrokers, to purchase for them shares in the company, and duly paid for such shares. In the course of the hearing of the appeal, however, it transpired that the plaintiffs had agreed with the defendants to buy the shares, and had actually taken them at a premium, in order to induce would-be shareholders in the company to believe that there was a market for its shares, and that the shares were of greater value than they in reality were—the old story, in short. The object of the action was to obtain rescission of the plaintiffs' respective contracts to purchase shares in the company on the ground, *inter alia*, that the defendants had passed off shares of their own to the plaintiffs instead of buying them upon the market. The true state of affairs having been brought to the notice of the Court of Appeal (Lords Justices Lindley, Lopes, and Smith), although it had not been pleaded, their lordships took the preliminary objection that there had been an agreement between the parties to cheat the public; that an agreement by two or more to do an illegal act, and to do it by illegal means, had been proved; and that, therefore, an indictable conspiracy had been committed. Under these circumstances the Court, of course, refused to grant any relief. The warning conveyed by the ominous words, 'indictable conspiracy,' should be taken to heart by persons engaged in the congenial, albeit surreptitious, occupation of 'rigging the market.' It may mean to them something more serious than a mere refusal by the Court to accede to their claims for relief.—*Law Journal* (London).

RECENT MANITOBA DECISIONS.

Criminal law—Conviction for gaming—Insufficient evidence of support by gaming.

Application for a writ of *habeas corpus* to bring up a prisoner in custody under conviction and sentence of imprisonment upon a charge of having been, on the 11th May, 1892, a person having no peaceable profession or calling to maintain himself by, but who, for the most part, supported himself by gaming, and of then being a loose, idle, and disorderly person and a vagrant.

The most important objection taken was that there was not before the magistrate evidence to warrant the conviction.

The charge was laid under R. S. C., c. 157, s. 8, s-s. (k), which provides that all persons who have no peaceable profession or calling to maintain themselves by, but who do, for the most part, support themselves by gaming or crime, or by the avails of prostitution, are loose, idle or disorderly persons, or vagrants. It was to "gaming" only that there was any pretence that the evidence pointed.

Held, that to support the conviction, it was necessary there should be evidence of four distinct propositions:—

1. That the accused had no peaceable profession or calling to support himself by.
2. That he practised gaming.
3. That from this practice he derived some substantial profits.
4. That these profits constituted the larger portion of his means of support.

There was abundant evidence of the first and second propositions, but there was no reasonable evidence to warrant a finding of either the third or fourth proposition. The accused might have neither profession nor calling by which to maintain himself. He might be possessed of sufficient means to enable him to live in idleness, or he might be supported by others. He might gamble extensively, and yet not derive from the practice any means of support. A few instances of winnings by the accused were mentioned in the evidence, but whether on the whole he won or lost there was nothing to show. The conviction was not supported by evidence of all the facts necessary to support it, and the prisoner must be discharged.—*Regina v. Davidson*, Killam, J., June 3, 1892.

INSOLVENT NOTICES.

Quebec Official Gazette, July 30, Aug. 6 & 13.

Judicial Abandonments.

- BOITEAU, George, master carpenter, Quebec, Aug. 3.
 BROWN, William Seavy, trader, Montreal, July 22.
 COCHRANE, John, New Richmond, July 27.
 DASTOUS, J., Ste. Flavie, Aug. 2.
 DROLET, Delphis, dry goods, Quebec, July 28.
 GILBERT, Thomas, tinsmith, St. George, Beauce, July 7.
 MARTIN & Co., B., (Catherine Cleary), boot and shoe dealers, Montreal, Aug. 3.
 ROY, Alfred, Thetford Mines, Aug. 2.

Curators Appointed.

- BÉLANGER, Geo., Sherbrooke.—Royer & Burrage, Sherbrooke, joint curator, July 25.
 BÉLIVEAU, David, St. Gabriel de Brandon.—J. E. Archambault, St. Gabriel, curator, July 23.
 BROWN, W. S.—C. Desmarteau, Montreal, curator, July 29.
 CHAYER, Fred. W.—C. Desmarteau, Montreal, curator, July 22.
 "COMPAGNIE d'Imprimerie et de Publication du Canada."—J. B. Young, Montreal, liquidator, Aug. 9.
 DASTOUS, J., Ste. Flavie.—H. A. Bedard, Quebec, curator, Aug. 8.
 DUPONT, Napoléon.—C. Desmarteau, Montreal, curator, July 25.
 FONTANELLE, Etienne.—Bilodeau & Renaud, Montreal, joint curator, July 27.
 GAGNON, Antoine, Rivière Ouelle.—G. Bouchard, Quebec, curator, Aug. 10.
 HARKIN & Co., B. (Catherine Cleary).—C. Desmarteau, Montreal, curator, Aug. 10.
 JOUETTE, Léandre.—Bilodeau & Renaud, Montreal, joint curator, Aug. 2.
 LANGLAIS, J. A., Quebec.—D. Arcand, Quebec, curator, Aug. 1.
 METAYER, J. A., Montreal.—J. McD. Hains, Montreal, curator, July 23.
 PEARSON, James, Montreal.—Kent & Turcotte, Montreal, joint curator, Aug. 2.
 ROCHETTE, O. (Cardinal, Dame Emilie).—A. Gaboury, Quebec, curator, July 26.
 ROUSSEAU, S.—L. G. G. Beliveau, Montreal, curator, Aug. 1.

WHITE & Co., J. D., Montreal.—Kent & Turcotte, Montreal, joint curator, Aug. 2.

Dividends.

BLAIS & Lefebvre, Quebec.—First dividend, payable Aug. 16, G. H. Burroughs, Quebec, curator.

BOA, Andrew.—First and final dividend, payable Aug. 31, J. M. M. Duff, Montreal, curator.

CHAPMAN, Alfred, & Jas. Drydale, Lachute.—First and final dividend, payable Aug. 9, G. J. Walker, Lachute, curator.

GÉLINAS, Joseph Edmond, Ste. Clothilde.—First and final dividend, payable Aug. 26, A. Quesnel, Arthabaskaville, curator.

HOLLAND & Co., R. Hy., Montreal.—First dividend, payable Sept. 1, A. W. Stevenson, Montreal, curator.

LANGLOIS, L. O. Hector, parish of St. Hugues.—First and final dividend, payable Aug. 23, J. O. Dion, St. Hyacinthe, curator.

LEBOUX & Co., Imbleau, Montreal.—First dividend, payable Aug. 30, Kent & Turcotte, Montreal, joint curator.

MORIN, O. N., St. Pie.—First and final dividend, payable Aug. 17, J. Morin, St. Hyacinthe, curator.

PARÉ, J. D., Montreal.—First and final dividend, payable Aug. 15, Lamarche & Olivier, Montreal, joint curator.

PENNÉE, et al., F.—First and final dividend, payable Aug. 22, D. Arcand, Quebec, curator.

RICKABY & Co., J. B. H., Montreal.—First and final dividend, payable Aug. 2, J. McD. Hains, Montreal, curator.

SOUCY & Co., E., Quebec.—First and final dividend, payable Aug. 12, J. A. Turgeon, Quebec, curator.

TRUDEAU, Siméon G.—Dividend on proceeds of lands, payable Sept. 1, E. W. Morgan, Bedford, curator.

Quebec Official Gazette, August 20 & 27.

Judicial Abandonments.

ALAIN, J. E., furniture dealer, Quebec, Aug. 22.

BRODEUR & frère, traders, St. Hyacinthe, Aug. 16.

DUROCHER, David, trader, St. Timothée, Aug. 10.

ROBILLARD & Co. (Virginie Lanaud), Beauharnois, Aug. 10.

SANSFACON, A. Alfred, trader and shoemaker, Quebec, Aug. 19.

Curators Appointed.

BOITEAU, George.—G. H. Burroughs, Quebec, curator, Aug. 24.

BRULÉ, Dieudonné.—C. Desmarteau and F. D. O. Turcotte, Montreal, joint curator, Aug. 3.

COCHRANE, John.—L. P. Lebel, New Carlisle, curator, Aug. 10.
DROLET, Delphis, Quebec. — H. A. Bedard, Quebec, curator,
August 12.

GIBERT, Thomas.—J. A. Turgeon, Quebec, curator, Aug. 17.

Dividends.

BOUVIER, Alexis, St. Barnabé.—First and final dividend, payable
Sept. 15, J. Morin, St. Hyacinthe, curator.

DIXON, John C., Montreal.—First and final dividend, payable
Sept. 15, A. W. Stevenson, Montreal, curator.

GOURDEAU, F., Quebec.—First and final dividend, payable Sept.
5, D. Arcand, Quebec, curator.

LEBRUN, Alexis.—First and final dividend on proceeds of real
estate, payable Sept. 9, M. Deschenes, Fraserville, curator.

LUNAN & Son, Wm., Sorel.—First dividend, payable Sept. 13,
John Hyde, Montreal, curator.

ROLLAND, Wilbrod, Montreal.—First and final dividend, payable
Aug. 30, J. H. Leclerc, assignee under Insolvent Act of 1875.

TRUDEAU, Siméon G.—Report of distribution, open to contesta-
tion up to Sept. 24, E. W. Morgan, Bedford, curator.

GENERAL NOTES.

PHOTOGRAPHER'S USE OF PICTURES.—There is a Chicago man who no doubt sympathizes with ex-President Cleveland in his efforts to prevent his infant daughter being made too much of a public character. This gentleman's name is Davis, and he lives on Milwaukee avenue in the Windy City. His experience with a photographer in defence of his baby has led him to bring suit for damages against the camera man. When Mr. Davis recently became a fond parent one of the first things to be done, of course, was to have a picture taken of the baby. According to a not uncommon custom in infant portraiture, the picture was nude. Of course Mr. Davis thought his baby the most beautiful one ever born, so what was his surprise on passing the photographer's studio one day to see the infant's picture displayed in the window, with this legend attached to one of her pretty toe-lets: "An ugly baby will sometimes make a pretty picture." There was his idolized daughter's form on view to all the myriads of the unwashed, with libel added to injury. As it was put in the legal papers afterwards drawn up, the statement insinuated "that said Edna Davis was an ugly baby, and caused her honesty, integrity and reputation to be defamed. "When

Mr. Davis remonstrated with the photographer, the latter refused to remove the picture and the objectionable sign from his window, and high words ensued. Soon after another portrait of Miss Edna appeared in the window, with this derisive motto appended: "My pop thinks he owns the earth." This, the legal paper said, "insinuated that the said Edward A. Davis was an overbearing, avaricious, dishonest man, claiming more than he was lawfully entitled to." Even after this Mr. Davis took no more severe measures than remonstrance with the photographer. More high words ensued, and the next addition to the free art gallery in the window was a picture of Mr. Davis himself, with the inscription: "All cowards carry a gun; I hear that you carry one." This settled the business, and Mr. Davis decided to bring suit, with the result that the photographer is now held in \$1,000 bonds to await the outcome of the trial.—*Buffalo Enquirer*.

LIABILITY OF BANK DIRECTORS.—The decision of the Supreme Court of the United States in *Briggs v. Spaulding* (141 U. S. 132), rendered by a divided court, is already bearing its crop of fruit. That decision held that the directors of a bank were not liable for losses of its assets under circumstances which, to an ordinary mind, ought to be characterized by the epithet gross negligence. In *Swenzel v. Penn Bank* (23 Atl. Rep. 505), the Penn Bank of Pittsburg, had been completely wrecked and gutted by its unfaithful servants, in the year 1884. The principal rascal was Riddle, its president. He proceeded with the knowledge of the cashier and the co-operation of one or more clerks and subordinates. He literally emptied the vaults of the bank in carrying on a gigantic speculation in oil. Nevertheless, the Supreme Court of Pennsylvania hold that the directors were not under an obligation to know this, and that they are not personally liable for not knowing it and preventing it. The New York Court of Appeals (*Hun v. Cary*, 82 N. Y. 65) has declared that the standard of diligence required of the trustees or directors of a corporation is that degree of care and prudence which men, prompted by self-interest, generally exercise in their own affairs; and it concedes that they are liable for that gross breach of duty which the civilians call *crassa negligentia*. (*Hun v. Cary*, 82 N. Y. 65; *Brinkerhoff v. Bostwick*, 88 N. Y. 52). Such also is the doctrine of the Supreme Court of Pennsylvania in an earlier case, (*Sperling's Appeal*, 71 Pa. St. 11) which may properly be regarded as the leading American case on this question.—*Am. Law Review*.

EDWIN JAMES.—“A fat florid man, with a large, hard face, was Edwin James, with chambers in the Temple and rooms in Pall Mall; his practice was extensive, his fees enormous. I had many consultations with him, but found it difficult to keep him to the subject of my case; he liked talking, but always diverted the subject into other channels. One day I took Dickens, who had never seen Edwin James, to one of these consultations. James laid himself out to be specially agreeable. Dickens was quietly observant. About four months afterward appeared the early numbers of ‘A Tale of Two Cities,’ in which a prominent part was played by Mr. Stryver. After reading the description I said to Dickens: ‘Stryver is a good likeness.’ He smiled. ‘Not bad, I think,’ he said, ‘especially after only one sitting.’”—*Edmund Yates’ Fifty Years of London Life.*

THE BAR AND THE ADMINISTRATION OF JUSTICE.—The bar as a body care nothing for the administration of justice. If they did the bar committee would be a very different body; it would be well supported financially and in every other way; on all occasions calling for the expression of professional opinion it would make itself heard, and its annual meeting would be an opportunity for prominent members of the bar to assemble, discuss deliberately matters of moment to their craft, and pass resolutions when necessary which would influence not only the tone of professional life and practice, but the constitution and sittings of the courts, the conduct of the bench and even the framing of our laws. But these Saturday afternoon flittings are indulged in for the purpose of throwing a veil over the utter indifference of the bar to the administration of justice and the proper government of the profession. On Saturday last, had the bar meant business, many matters might have been dealt with; there is the public prosecutor, the decline of legal business, professional advertising, the attitude of counsel in the Court of Appeal, the right of a judge to put in the dock for a lecture any one who is incidentally named at a criminal trial, the defence of witnesses, sketching in court, sons practising before paternal County Court judges, the appointment of County Court judges, the patronage of the lord chancellor and ministry of justice. Indeed the field of inquiry and discussion has scarcely any limit. But Sir Edward Clarke, Dr. Pankhurst and Mr. Oswald sailed round every thing to the safe harbor of an adjournment. And so we suppose it always will be.—*Law Times, (London).*

THE LEGAL NEWS.

VOL. XV.

SEPTEMBER 1, 1892.

No. 17.

CURRENT TOPICS AND CASES.

The official text of the judgment of the Judicial Committee in *Robinson v. C. P. R. Co.*, which will be found in the report in the present issue, shows that their lordships went further than was at first supposed, and rendered a final judgment upon the whole case, excluding all further litigation as to the *quantum* of damages. Their reasons for doing so are stated, and will be considered satisfactory. On the question of prescription, the opinion of the Committee is brief and to the point. So much learning has been expended on this question, that the reader of the judicial opinions is in danger of overlooking how simple the point really is. The judgment of the Judicial Committee has all the greater force in that it was delivered by Lord Watson who, at the outset of the argument on the application for special leave to appeal, seemed to be considerably impressed by the view which led the majority of the Supreme Court to reverse the unanimous judgment of our Court of Queen's Bench.

Mr. Justice Church has survived but a short time his resignation as a member of the Court of Queen's Bench. The learned Judge was not in robust health when, five or six years ago, he was appointed to the vacancy created by the death of Mr. Justice Ramsay, and almost from the outset his efforts to discharge the duties of the position

were impeded by ailments of a more or less serious nature. With better health Mr. Justice Church would have left no faint impress on our provincial jurisprudence. His judgments were usually delivered in a manner which carried conviction to the minds of his hearers, and even where he dissented it will be found, we think, that he was not always wrong.

Mr. Justice Denman and the Recorder of Liverpool, Mr. Hopwood, Q.C., differ somewhat warmly on the question of lenient sentences. The Judge having passed certain strictures at the recent Liverpool assizes on the Recorder for the lightness of his sentences, the latter waited for the opening of his Court, the Liverpool sessions, and in his charge to the Grand Jury asserted his entire independence of the supervision of any other court. As to the matter of the criticism itself, he added that it was impossible to condemn sentences either for being too severe or too light without having the fullest information as to what passed at the trial. Let them take, for example, the offence of housebreaking. That offence might vary between extremes of merely lifting a latch of an unlocked door or effecting entrance with the most elaborate and ingeniously applied tools. No one would deny that the first might be punished with a light sentence, while the latter deserved a heavy one. But in the record of previous convictions all that appeared was 'housebreaking.' Who, then, on such barren information, was justified in authoritatively saying that a sentence of a day was too little, or a sentence of twelve months was too much? Further, in order to be just in criticising, it was necessary to inquire whether the convict had or had not been already before sentence two months or six weeks in prison—a fact which would not appear. It might also be well to have regard to the age of the delinquent; a boy of eighteen might be more leniently dealt with than a man of thirty. 'To put down,' 'To make example of,' were not principles of sentencing which his experience, as long

and varied as that of any judge, taught him to adopt. They failed in the one purpose, and they caused bitter and fearful wreck of individuals in the other. They sometimes lost sight of the fact that human life and human suffering were the subjects of their thoughtless experiments.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, July 23, 1892.

Coram LORDS WATSON, MACNAGHTEN, MORRIS AND HANNEN,
SIR RICHARD COUCH AND LORD SHAND.

ROBINSON (plaintiff and appellant) v. CANADIAN PACIFIC RAIL-
WAY COMPANY (defendant and respondent).

*Prescription—Art. 1056, C. C.—Action under—Action for bodily
injuries—Art. 2262, C. C.*

HELD:—(*Reversing the judgment of the Supreme Court of Canada, 15 Leg. News, 70,*) *That the right of action under Art. 1056, C. C., which is given to the widow, or other relatives therein mentioned, subsists even when the injured person's right of action has been extinguished before his death by the prescription of one year against actions for bodily injuries under Art. 2262, C. C.*

Special leave to appeal having been granted to the plaintiff, Robinson, from the judgment of the Supreme Court of Canada (see 15 Legal News, pp. 70–91), June 22, 1891, reversing a judgment of the Court of Queen's Bench, Montreal, June 19, 1890, the case was heard on the merits.

Bompas, Q. C., and Chester Jones for appellant.

H. Abbott, Q. C., and F. C. Gore for respondents.

LORD WATSON:—This is an action of damages brought before the Superior Court of the Province of Quebec by the appellant, the widow of Patrick Flynn, on her own behalf and as tutrix of their minor child, upon the allegation that the death of her husband, which occurred on the 13th November, 1883, was the result of bodily injuries sustained by him on the 27th August, 1882, whilst he was in the service of the respondents, through the negligence of their employés.

The case was tried in April, 1885, before Mr. Justice Doherty and a jury, who found for the appellant, and assessed damages at

\$2,000 to herself and \$1,000 to her child. The appellant then applied to the Superior Court, sitting in review, to have judgment entered in terms of the verdict; and the respondents moved for a new trial. The Court rejected the appellant's application, and allowed the respondents a new trial upon payment of the costs of the last, and without costs of the motion, upon the ground that the presiding judge had wrongly directed the jury that, in estimating damages, they were entitled to consider the anguish and mental sufferings of the widowed mother and orphan child. That decision was on appeal set aside by the Queen's Bench, who gave effect to the verdict with costs of suit. On appeal from the Queen's Bench the Supreme Court of Canada reversed their decision, restored the judgment of the Superior Court in review, and condemned the appellant in the costs of the appeals to the Queen's Bench and to the Supreme Court of Canada.

On a second trial, in November, 1888, before Mr. Justice Davidson, the jury again found for the appellant, with \$4,500 damages to herself and \$2,000 to her child; and thereupon the appellant moved the Superior Court in Review for judgment. The respondents moved in the same Court for (1) a new trial, (2) arrest of judgment, and (3) judgment in their favour *non obstante veredicto*. The second and third of these motions were rested upon a plea then put forward for the first time by the respondents, to the effect that more than twelve months having elapsed between the death of Patrick Flynn and the date of the injuries which are said to have occasioned it, all right of action competent to him had been extinguished by prescription; and that by law the right of the appellant to recover damages for such bodily injuries was also extinguished before his death. The Court, as its decree bears, heard parties upon all of these motions, and by a majority of two to one dismissed the respondent's motions, and granted that of the appellant with all costs of suit not previously adjudicated upon. On appeal by the respondents, the Court of Queen's Bench, consisting of five Judges, unanimously affirmed the judgment of the Court below on all points with costs.

The case was then carried by appeal to the Supreme Court of Canada, who, on the 22nd June, 1891, by a majority of four to one, reversed the decisions of the Queen's Bench in appeal and of the Superior Court in review; dismissed the appellant's motion for judgment; also refused and dismissed the motions

made by respondents "for a new trial and in arrest of judgment"; and granted the respondents' motion for judgment *non obstante veredicto*, with costs of action in all three Courts. On the application of the appellant, their lordships humbly advised Her Majesty to grant special leave to appeal against that part of the judgment which sustains the new plea raised by the respondents after the second trial. In making that recommendation, their lordships were influenced by these considerations,—the general importance to the Province of Quebec of the question arising upon the construction of its Civil Code; the great difference of judicial opinion which it evoked; and the fact that the decision of the majority in the Supreme Court appears, from the judgment of Mr. Justice Taschereau, to have been based to some extent upon the authority of English decisions. Their lordships intimated that they would not hear a third appeal upon a motion for new trial involving no question of law, but that, in the event of their sustaining the appeal allowed, they would, if the matter of new trial should prove to be still open to the respondents, remit it for decision to the Court below.

The appellant's claim is founded upon Section 1056 of the Civil Code of Lower Canada, the first paragraph of which enacts that, "In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death." The appellant brought the action within seven months after her husband's decease, while the prescription thus made applicable to her statutory claim was still current. But Section 2262 (2) of the Code provides that actions "for bodily injuries" are prescribed by one year, "saving the special provisions contained in Article 1056, and cases regulated by special laws." Seeing that Patrick Flynn lived for nearly 15 months after the date of the injuries which caused his death, their lordships see no reason to doubt that any claim competent to him against the respondents had been cut off by prescription. Whether the appellant has thereby been deprived of the right of action which, in the circumstances of this case, she would undoubtedly have had under Section 1056 if he had died during the currency of the prescriptive period applic-

able to his right, depends upon the construction of the two sections of the Code which have just been referred to.

The Code became law in the year 1866, and Section 1056 superseded the provisions of Cap. 78 of the Consolidated Statutes of the then Province of Canada (1859), which, though not identical in expression, were the same in substance with the enactments of the English Statute, 9 & 10 Vict., cap. 93, commonly known as Lord Campbell's Act. In both Statutes a right of action is given, in general terms, to the representative of the deceased, for behoof of his widow and other relations entitled, in all cases where an act or default is such as would, if death had not ensued, have entitled the party injured to maintain an action. Their provisions leave indefinite some things which in the Code are defined. They leave to implication the conditions upon which the right is not to survive, and, by that omission, favour the suggestion that what was intended to pass to the representative was such right of action as the deceased had at the time of his decease. In England the statutory period of limitation applicable to such claims by injured persons is six years. The observations of English judges cited at the bar, and noticed by Mr. Justice Taschereau, did not refer to, and can hardly have contemplated a case in which that period had elapsed before the death of the injured person. The authorities from which they were taken merely establish that, under the English Act, the representative can have no right of action, *first*, where the act or default complained of raised no liability to the deceased, at common law, or by reason of his having contracted to bear the risk of it, and, *secondly*, where the deceased has been compensated or has settled and discharged his claim. These authorities can have no bearing upon the point raised for decision in this appeal, unless it can be shown that the provisions of the Code are in substance identical with those of the Statute to which they have reference.

In the course of the argument, counsel for the parties brought somewhat fully under their lordships' notice the law of reparation applicable to cases like the present, as it existed prior to the enactment of the Code; and they discussed the question whether and, if so, how far Cap. 78 of the Statute of 1859 altered or superseded the rules of the old French law. These may be interesting topics, but they are foreign to the present case, if the provisions of Section 1056 apply to it, and are in themselves intelligible and free from ambiguity. The language used by Lord

Herschell in *Bank of England v. Vagliano Brothers* (I. Ap. Ca., N. S., p. 145), with reference to the "Bills of Exchange Act, 1882" (45 & 46 Vict., c. 61), has equal application to the Code of Lower Canada. "The purpose of such a statute surely was that "on any point specifically dealt with by it, the law should be "ascertained by interpreting the language used instead of, as "before, by roaming over a vast number of authorities." Their lordships do not doubt that, as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special ground.

In so far as they bear upon the present question, the terms of Section 1056 appear to their lordships to differ substantially from the provisions of Lord Campbell's Act and of the Provincial Statute of 1859. The Code ignores the representative of the injured person, and gives a direct right of action to his widow and relations, a change calculated to suggest that these parties are to have an independent, and not a representative right. A difference of much greater importance is to be found in the fact that the Code distinctly specifies certain conditions affecting the right of action competent to the deceased, which are also to operate as a bar against any suit at the instance of his widow and his ascendant or descendant relations after his death. These conditions are not expressed in either of the Statutes referred to; and, according to a well-known canon of construction, it must be taken that they were inserted in the Code for the purpose of making it clear that no conditions affecting the personal claim of the deceased, other than those specified, are to stand in the way of the statutory right conferred upon his widow and relatives. The first paragraph of Section 1056, read in its ordinary and natural sense, enacts that the widow and relations shall have a right to recover all damages occasioned by the death from the person liable for the offence or quasi-offence from which it resulted, provided they can show (1) that death was due to that cause, and (2) that the deceased did not, during his lifetime, obtain either indemnity or satisfaction for his injuries.

Assuming, as the jury have found, that the death of Patrick Flynn in November 1883 was due to bodily injuries sustained in August 1882, for which the respondents were answerable, then

all the conditions requisite in order to give the appellant a right of action have been fulfilled to the letter. The prescription established by section 2262 (2) had cut off the deceased's right of action in August 1883; but the Code does not make it a condition of the right of action given to the appellant by Section 1056 that her husband's claim shall not have prescribed. That prescription is not, within the meaning of the Code, equivalent to indemnity or satisfaction is made perfectly clear by a reference to Section 1138, which enumerates the various ways in which an obligation may be extinguished. The argument of respondents, if given effect to, would practically add to the language of Section 1056 words which are not to be found there, such as "and without his claim having been otherwise extinguished," or, in other words, involves the insertion of a new condition which the Legislature has excluded.

It appears to their lordships that, when Sections 1056 and 2262 (2) are read together, it becomes apparent that the deceased's claim in respect of his bodily injuries, and the claim of his widow and relations in respect of his death, were to run separate courses of prescription; and that their claim, which cannot emerge until his death occurs, was not to be either directly or indirectly affected by the provisions of 2262 (2). The saving clause in that subsection is only intelligible upon the footing that it was meant to treat the death as the foundation of their right of action; to apply to that right the rule of prescription introduced by Section 1056, and to exempt it altogether from the operation of the prescriptive rule which limited the deceased's claim.

It may be noticed that the provisions of the second paragraph in Section 1056, are inconsistent with the view that, in order to give a claim to his widow and relations, the deceased must have had a good cause of action at the time of his death. These provisions plainly assume that, on the death of a person dying from wounds received in a duel, his widow and relations would have a good action for all damages thereby occasioned against his antagonist, although he himself could have no right of action, their sole object being to extend liability to others who took part in the duel, whether as seconds or witnesses.

The respondents argued that, in the event of judgment being against them upon the question of the widow's title to sue, the case ought to be sent back to the Supreme Court of Canada, in order that they may be heard upon their motion for a new trial.

Having now the record before them, their lordships are of opinion that the course thus suggested is no longer open. The judgment appealed from bears, *inter alia*, "That the motions by "the appellants (*i.e.*, the present respondents) for a new trial "and in arrest of judgment should be and the same were respectively refused and dismissed." As it stands, that is an express adjudication upon the very point which the respondents desire to have reheard; and the Supreme Court of Canada can have no jurisdiction to review it. In order to meet that difficulty, the respondents suggested that the decerniture was inserted *per incuriam*, and that the Supreme Court might strike it out, upon a motion to correct their judgment; and they relied upon the circumstance that the point is not discussed in the opinion of Mr. Justice Taschereau. Without clear grounds for doing so, their lordships are not inclined to protract litigation, already excessive. Considering that all the judges, seven in number, who heard the motion in the Courts of Quebec Province were of opinion that the evidence warranted a verdict against the respondents, that one of them only thought the verdict ought to be disturbed, and that upon the single ground that the damages awarded were too large, their lordships see no reason to suppose that the judgment of the Supreme Court of Canada was incorrectly framed or that any injustice will be done by their finally disposing of the case at this stage.

Their lordships will therefore humbly advise Her Majesty to discharge the judgment appealed from, to restore the judgment of the Superior Court in review; dated the 31st January, 1889, and the judgment of the Queen's Bench in Appeal, dated the 19th June, 1890, and to order the respondents to pay to the appellant her costs of the appeal to the Supreme Court in the second trial. The respondents must also pay to the appellant her costs of this appeal.

Judgment reversed.

Hatton & McLennan, for appellant.

Abbotts, Campbell & Meredith, for respondent.

QUEEN'S BENCH DIVISION.

LONDON, May 28, 1892.

THE QUEEN v. RUSSETT—2 Q. B. Div. (1892) 312.

Criminal Law—Larceny—Possession Obtained by Fraud—Larceny by a Trick.

The prisoner agreed at a fair to sell a horse to the prosecutor for £23, of which £8 was to be paid to the prisoner at once, and the remainder upon delivery of the horse. The prosecutor handed £8 to the prisoner, who signed a receipt for the money; by the receipt it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse to the prosecutor, but caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it. Held, that the prisoner was rightly convicted of larceny by a trick.

Case stated by the deputy chairman of the Gloucestershire Quarter Sessions.

The prisoner was tried and convicted upon an indictment charging him with having feloniously stolen, on March 26, 1892, the sum of £8 in money of the moneys of James Brotherton. It appeared from the facts proved in evidence that on the day in question the prosecutor attended Whitcomb fair, where he met the prisoner, who offered to sell him a horse for £24; he subsequently agreed to purchase the horse for £23, £8 of which was to be paid down, and the remaining £15 was to be handed over to the prisoner either as soon as the prosecutor was able to obtain the loan of it from some friend in the fair (which he expected to be able to do), or at the prosecutor's house at Little Hampton, where the prisoner was told to take the horse if the balance of £15 could not be obtained in the fair. The prosecutor, his son, the prisoner and one or two of his companions, then went into a public house, where an agreement in the following words was written out by one of the prisoner's companions, and signed by prisoner and prosecutor: "26th March, G. Russett sell to Mr. James and Brother (sic) brown horse for the sum of £23 0s. 0d. Mr. James and Brother pay the sum of £8, leaving balance due £15 0s. 0d. to be paid on delivery." The signatures were written over an ordinary penny stamp. The prosecutor thereupon paid the prisoner £8. The prosecutor said in the course of his evidence: "I never expected to see the £8 back, but to have the horse." The prisoner never gave the prosecutor an opportunity of attempting to borrow the £15, nor did he ever take or send

the horse to the prosecutor's house; but he caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it.

It was objected on behalf of the prisoner that there was no evidence to go to the jury, on the ground that the prosecutor parted absolutely with the £8, not only with the possession, but with the property in it, and consequently that the taking by the prisoner was not larceny, but obtaining money by false pretences, if it was a crime at all. The objection was overruled. In summing up, the deputy chairman directed the jury that if they were satisfied from the facts that the prisoner had never intended to deliver the horse, but had gone through the form of a bargain as a device by which to obtain the prosecutor's money, and that the prosecutor never would have parted with his £8 had he known what was in the prisoner's mind, they should find the prisoner guilty of larceny.

The question for the court was whether the deputy chairman was right in leaving the case to the jury.

LORD COLERIDGE, C.J. I am of opinion that this conviction must be supported. The principle which underlies the distinction between larceny and false pretences has been laid down over and over again, and it is useless for us to cite cases where the facts are not precisely similar when the principle is always the same. When the question is approached it will be found that all the cases, with the possible exception of *Rex v. Harvey*, 1 Leach, 467, as to which there may be some slight doubt, are not only consistent with, but are illustrations of the principle, which is shortly this: If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, that is larceny. This seems to me not only good law, but good sense, and this principle underlies all the cases. If however authority is wanted, it is to be found in two cases which we could not overrule without the very strongest reason for so doing. The first is *Reg. v. McKale*, L. R., 1 C. C. 125, where Kelly, L. C. B., said: "The distinction between fraud and larceny is well established. In order to reduce the taking under such circumstances as in the present case from larceny to fraud the transaction must be complete. If the transaction is not complete, if the owner has not parted with the pro-

perty in the thing, and the accused has taken it with a fraudulent intent, that amounts to larceny." The distinction, in which I entirely concur, is there expressed in felicitous language by a very high authority. The other case is that of *Reg. v. Buckmaster*, 20 Q. B. Div. 182, which seems to me directly in point. That decision was grounded on *Rex v. Oliver*, 2 Russ. Crimes, 170, and *Rex v. Robson*, Russ. & Ry. 413, where the same principle was applied and the same conclusion arrived at.

POLLOCK, B. I agree in the conclusion at which the court has arrived, and would add nothing to the judgment of my lord but that I wish it to be understood that this case is decided on a ground which does not interfere with the rule of law which has been so long acted on; that where the prosecutor has intentionally parted with the property in his money or goods, as well as with their possession, there can be no larceny. My mind has therefore been directed to the facts of the case, in order to see whether the prosecutor parted with his money in the sense that he intended to part with the property in it. In my opinion he certainly did not. This was not a case of payment made on an honest contract for the sale of goods, which eventually may, for some cause, not be delivered, or a contract for sale of a chattel such as in *Rex v. Harvey*, 1 Leach, 467. From the first the prisoner had the studied intention of defrauding the prosecutor; he put forward the horse and the contract, and the prosecutor, believing in his *bona fides*, paid him £8, intending to complete the purchase and settle up that night. The prisoner never intended to part with the horse, and there was no contract between the parties. The money paid by the prosecutor was no more than a payment on account.

HAWKINS, J. I am entirely of the same opinion. In my judgment the money was merely handed to the prisoner by way of deposit, to remain in his hands until completion of the transaction by delivery of the horse. He never intended, or could have intended, that the prisoner should take the money and hold it, whether he delivered the horse or not. The idea is absurd; his intention was that it should be held temporarily by the prisoner until the contract was completed, while the prisoner knew well that the contract never would be completed by delivery. The latter therefore intended to keep and steal the money. Altogether, apart from the cases and from the principle which has been so

frequently enunciated, I should not have a shadow of doubt that the conviction was right.

A. L. SMITH, J. The question is whether the prisoner has been guilty of the offence of larceny by a trick, or that of obtaining money by false pretences. It has been contended on his behalf that he could only have been convicted on an indictment charging the latter offence, but I cannot agree with that contention. The difference between the two offences is this: If possession only of money or goods is given, and the property is not intended to pass, that may be larceny by a trick, the reason being that there is a taking of the chattel by the thief against the will of the owner; but if possession is given, and it is intended by the owner that the property shall also pass, that is not larceny by a trick, but may be false pretences, because in that case there is no taking, but a handing over of the chattel by the owner. This case therefore comes to be one of fact, and we have to see whether there is evidence that at the time the £8 was handed over the prosecutor intended to pass to the prisoner the property in that sum, as well as to give possession. I need only refer to the contract, which provides for payment of the balance on delivery of the horse, to show how impossible it is to read into it an agreement to pay the £8 to the prisoner, whether he gave delivery of the horse or not. It was clearly only a deposit by way of part payment of the price of the horse, and there was ample evidence that the prosecutor never intended to part with the property in the money when he gave it into the prisoner's possession.

WILLS, J. I am of the same opinion. As far as the prisoner is concerned it is out of the question that he intended to enter into a binding contract; the transaction was a mere sham on his part. The case is not one to which the doctrine of false pretences will apply, and I agree with the other members of the court that the conviction must be affirmed.

Conviction affirmed.

THE LATE MR. JUSTICE CHURCH.

Mr. Justice Church, who retired from the Court of Queen's Bench last year, died at Montreal, Aug. 30, from the effects of an illness which attacked him while staying at Lorne Park, near Toronto.

Mr. Church was the descendant of a New England family, which severed at the time of the revolutionary war, one part taking the loyalist and the other the popular side. Jonathan Mills Church, after serving in the Royal army, in which he also lost a brother, was taken prisoner in 1777, but contrived to escape, and made his way to Canada where he settled in the vicinity of Brockville. When the war of 1812 broke out he once more undertook military service against his old foes; after the peace he settled down to a quiet life, dying at a remarkable old age in 1846. One of his sons, Dr. Peter Howard Church, took up his residence at Aylmer, Que., where his second son, Levi Ruggles, was born on the 24th of May, 1836. The late judge first intended to follow his father's profession, and after passing through Victoria university, Cobourg, graduated in medicine at Albany and also at McGill, where he took primary, final and thesis prizes. He then studied law under the late Henry Stuart, Q.C., and later with the late Edward Carter, Q.C., and was called to the L. C. Bar in 1859. He went first into business at Aylmer, as a member of the firm of Fleming, Church & Kenny, and was for some time prosecuting attorney of the district of Ottawa. He was named a Q.C. in 1874. He was elected to the Legislature for Ottawa county in 1867, retiring in 1871. Being offered a seat in the provincial Cabinet as Attorney General in 1874 he accepted, and was returned for Pontiac by acclamation, re-elected in 1875, and again in 1878. In January, 1876, he was transferred to the treasurership, which office he filled till the dismissal of the DeBoucherville Cabinet by Lieutenant-Governor Letellier in March, 1878. On the defeat of the Joly ministry, when Mr. Chapleau was called to the premiership, Mr. Church was again offered a portfolio, but declined the honor, preferring to devote his time to his profession. He practised for some time in Montreal as head of the firm of Church, Chapleau, Hall & Atwater. In 1887 he was called to a seat in the Court of Queen's Bench, which, about a year ago, he was compelled to resign owing to continued ill-health. A prolonged rest did something to restore his strength, but his health was never thoroughly re-established, and he was more or less an invalid for the past two years. Mr. Church was an able business man and took an active interest in public affairs. He was for some time a director of the Ottawa Agricultural Insurance Company, of the Bank of Ottawa, and of the Pontiac and Pacific Junction railway, which road he was largely instrumental in having built. While Pro-

vincial Treasurer he visited England to negotiate one of Quebec's numerous loans. Though practising law he was elected a governor of the College of Physicians and Surgeons of Quebec. He held a high position at the Bar, and among other important cases was engaged in the noted Ontario Streams Act appeals. As a public man he won an honorable reputation for ability and good purpose. On the Bench he was a careful, painstaking and clear minded judge.

He was married on the 3rd September, 1859, to Miss Jane Erskine, daughter of Wm. Bell, barrister, and niece of Gen. Sir George Bell, K.C.B., who, with one son and three daughters, two of them married, survive him.

INSOLVENT NOTICES.

Quebec Official Gazette, Sept. 3 & 10.

Judicial Abandonments.

BOUCHARD, Ovide, Quebec, Sept. 6.

GAUTHIER, Jean, St. Jérôme, Chicoutimi, Aug. 31.

GIRARDIN, Dame Eliza, Nicolet, Aug. 30.

MARTEL, Honoré, Chicoutimi, Sept. 7.

ROY, Marie Elzire, veuve Eugène Blumhart, St. Raymond, doing business under the name of Guimont & Co., Sept. 7.

VILLENEUVE, Thos., St. Fulgence, Aug. 31.

Curators Appointed.

BERNIER, late A. H., Isle Verte.—H. A. Bedard, Quebec, provisional guardian, Sept. 1.

CARPENTER, Charles E., Abercorn.—E. L. Harvey, Abercorn, curator, Sept. 1.

DIXON, Jas. H.—L. G. G. Beliveau, Montreal, curator, Sept. 5.

LAFLEUR, FRÉDÉRIC, boot and shoe dealer, Montreal.—C. Desmarteau, Montreal, curator, Sept. 5.

MEROIER, J. A.—C. Desmarteau, Montreal, curator, Aug. 19.

ROBILLARD & Co (Virginie Lanaud).—C. Desmarteau, Montreal, curator, Aug. 23.

SANSFAGON, A. A., shoemaker, Quebec.—Geo. Darveau, Quebec, curator, Sept. 2.

Dividends.

BILODEAU & fils, J., Ste. Marie.—First dividend, payable Sept. 27, H. A. Bedard, Quebec, curator.

BRIGGS, Wm. H., Stanbridge East.—First and final dividend, payable Sept. 25, H. Beatty, Stanbridge East, curator.

DROLET, Delphis, Quebec.—First dividend, payable Sept. 27, H. A. Bedard, Quebec, curator.

FONTANELLE, Etienne.—First and final dividend, payable Sept. 16, Bilodeau & Renaud, Montreal, joint curator.

MOUSSEAU & Co., H.—First and final dividend, payable Sept. 24, Bilodeau & Renaud, Montreal, joint curator.

PARENT & Co., D., coal dealers, Montreal.—First and final dividend, payable Sept. 14, C. Desmarteau, Montreal, curator.

PARKER, S. H., Montreal.—First and final dividend, payable Sept. 13, C. Desmarteau, Montreal, curator.

PORTELANCE & Co., Victor.—Dividend on hypothecary claims, payable Sept. 20, G. H. Burroughs, Quebec, curator.

QUINTAL, Isaie A.—Dividend, payable Sept. 20, C. Desmarteau, Montreal, curator.

GENERAL NOTES.

EVIDENCE IN JAPANESE COURTS OF JUSTICE.—A Japanese journal, describing the manner in which witnesses are sworn and evidence taken in native Courts of justice, says that with the Japanese anything to which a man affixes his seal is considered more sacred than what he may say. Hence, each witness is required to make a declaration to the effect that with a mind free from bias in favour of or against either of the litigating parties, and with perfect fairness, he will give evidence, and, after this has been read out by the recorder of the Court and handed to the witness in the form of a document, the latter is expected to affix his seal to it. The same plan is adopted with the statement of facts which, in the course of the examination he undergoes, a witness makes in Court. The purport of his evidence is written out by the recorder, and before the Court he is required to make what corrections are necessary to render the written statement a trustworthy record of his evidence, and to guarantee its correctness by affixing his seal. Though this process occupies a good deal of time, it precludes the possibility of the evidence given being incorrectly reported, which, in trials where the decision of the Court depends largely on oral evidence, is a matter of much moment.

THE LEGAL NEWS.

VOL. XV.

SEPTEMBER 15, 1892.

No. 18.

CURRENT TOPICS AND CASES.

Among the proposals of the Council of Judges in England, respecting the administration of justice, one seems to go very far indeed. It is suggested that no pleading shall be allowed without order. Mr. Justice Cave, in an elaborate review of the proposals, criticizes this bold innovation, holding that it is impossible to abolish pleadings, and that in some form or other the judge at the trial must have before him in writing the issues he has to try, and whether they should be arrived at by pleadings out of Court, or by oral pleadings before the Master, taken down by him, and transmitted to the Court, is only a question of costs. His lordship thinks that pleading out of Court as at present, with a salutary use of the existing order which gives power to one party by notice to call upon the other to admit any document or fact, is the simplest and most economical mode.

The report of the Commissioner of the London Metropolitan Police for 1891, contains some noticeable facts. In the first place, we find that an army exceeding fifteen thousand men is employed for the protection of person and property. The authorized strength of the force at the end of the year was 31 superintendents, 787 inspectors, 1,637 sergeants, and 12,588 constables, making a total of 15,038. Four superintendents, 57 inspectors, 204 ser-

geants, and 1,475 constables were employed on special duties for various Government departments (19 at the Houses of Parliament, 62 in royal parks and grounds, 23 at the National Gallery, 75 at the South Kensington Museum, and 27 at the British Museum) and by public companies and private individuals. About 60 per cent. of the number available for duty in the streets is required for night duty—from 10 p.m. to 6 a.m. The Metropolitan Police District extends over a radius of fifteen miles from Charing Cross, exclusive of the City of London and its liberties. It embraces an area of about 688 square miles.

Two decisions of the Court of Appeal, rendered at Montreal, June 8, 1892, settle an important question as to the responsibility of carriers for the loss of goods after arrival at destination. The cases have a considerable resemblance, and the same principle was applied to each. In one, *Canada Shipping Co. & Davison*, a contract of carriage was entered into at Liverpool, under which the appellant, a steamship company, was bound to carry the respondent's baggage to Montreal, to use due care in its safe-keeping, and to deliver it to him in due course on the steamer's arrival in Montreal. When the steamship carrying the baggage arrived in the port of Montreal, the respondent's baggage was taken from the vessel and placed in the company's shed on the wharf, but the respondent could not carry it away until it had been examined and passed by the Customs Officers, and until such examination, it remained in the company's shed and under its custody. One of the respondent's trunks disappeared before the examination, the loss being discovered within four and twenty hours after the arrival of the vessel. The Court was not unanimous. The majority (Lacoste, C. J., Hall and Wurtele, JJ.) affirming the decision of Pagnuelo, J., M. L. R., 6 S. C. 388, held that on the arrival of a vessel in port, passengers are entitled to a reasonable delay before they can be called upon to receive and remove their baggage, and until such delay has

expired the carrier is responsible for its safe-keeping *under the contract of carriage*, and not as a mere voluntary depositary. It was also held that the term of four and twenty hours is within a reasonable delay. It followed that the passenger has the right under such circumstances to establish the value of the lost baggage by his own oath, and to recover the same, in the absence of proof by the carrier that the loss arose from an uncontrollable event. A minor point involved in the case was whether the passenger's oath makes proof of the value of articles in a lost trunk, belonging to his wife who accompanied him, and who was separate as to property. This point was specially raised on the part of the carrier, and though not noticed in the opinion of the Court, must be taken as decided in the affirmative inasmuch as the judgment was confirmed purely and simply. The second case, *Canadian Pacific Railway Co. & Pellant et vir*, was also an appeal from a decision of Pagnuelo, J., reported in M. L. R., 7 S. C. 131, where the observations of the learned judge will be found. In this case the passenger travelled by train. On reaching her destination, it was not convenient for her to remove her luggage immediately. When she went to claim it on the following day part of it was not forthcoming. It was held by the majority of the Court (Baby, Hall and Wurtele, JJ.) that she was within a reasonable delay, and was entitled to establish the value of the lost articles by her own oath. The dissentient judges in each case were Justices Bossé and Blanchet, the two decisions taken together showing that the six judges presently constituting the Court stand four to two on the question.

SUPREME COURT OF CANADA.

June 28, 1892.

Quebec.]

DOMINION SALVAGE & WRECKING CO. V. ATTORNEY GENERAL.

Public Company—Act of Incorporation—Forfeiture of—44 Vic. c. 61 (D.)—Attorney General of Canada—Information—R. S. C. c. 21, s. 4—Scire facias—Form of proceedings—Arts. 997 et seq. C. C. P.—Subscription to capital stock—Condition Precedent.

The appellant company by its act of incorporation (44 Vic. c. 61 (D.) was authorized to carry on business provided \$100,000 of its capital stock were subscribed for, and thirty per cent. paid thereon within six months after the passing of the act, and the Attorney General of Canada having been informed that only \$60,500 had been *bona fide* subscribed prior to the commencing of the operations of the company, the balance having been subscribed for by one G. in trust, who subsequently surrendered a portion of it to the company, and that the thirty per cent. had not been truly and in fact paid thereon, sought at the instance of a relator, by proceedings in the Superior Court for Lower Canada, to have the company's charter set aside and declared forfeited.

Held, affirming the judgment of the Court below,

1. That this being a Dominion Statutory charter proceedings to set it aside were properly taken by the Attorney General of Canada.

2. That such proceedings taken by the Attorney General of Canada under arts. 997 *et seq.*, if in the form authorized by those articles, are sufficient and valid though erroneously designated in the pleadings as a *scire facias*.

3. That the *bona fide* subscription of \$100,000 within six months from the date of the passing of the act of incorporation, and the payment of the 30 per cent. thereon, were conditions precedent to the legal organization of the company, with power to carry on business, and as these conditions had not been *bona fide* and in fact complied with within such six months, the Attorney General of Canada was entitled to have the Company's charter declared forfeited. Gwynne, J., dissenting.

Appeal dismissed with costs.

Robinson, Q.C., Macmaster, Q.C., and Goldstein, for appellants.
Blake, Q.C., and Lajoie, for respondent.

Quebec.]

June 28, 1892.

RODIER V. LAPIERRE.

*Appeal—Monthly Allowance of \$200—Amount in Controversy—
Annual Rent—R. S. C. ch. 139, sec. 29 (b)—Jurisdiction.*

B. R. under a will and an act of the Legislature of the Province of Quebec, (54 Vic. ch. 96) claimed from A. L. as administratrix of the estate of Hon. C. S. Rodier, the sum of \$200, being for an instalment of the monthly allowance which A. L. was authorized to pay to each of the testator's children out of the revenues of his estate. The action was dismissed by the Court of Queen's Bench for Lower Canada, and on appeal to the Supreme Court,

Held, that the amount in controversy being only \$200, and there being no "such future rights" where the rights in future of B. R. might be bound within the meaning of those words in sec. 29 (b) of the Supreme "Exchequer Courts Act," the case was not appealable.

Annual rents in sub-sec. (b) of sec. 29 of R. S. C. ch. 139, mean "ground rents," *rentes foncières*, and not an annuity or any other like charges or obligations.

Appeal quashed with costs.

Lash, Q.C., & DeMartigny, for appellant.

Geoffrion, Q.C., & Beaudoin, Q.C., for respondent.

Quebec.]

June 28, 1892.

DUROIS V. CORPORATION DE STE. ROSE.

Appeal—Road Repair—Municipal By-Law—Validity of—Rights in future—Supreme and Exchequer Courts Act, sec. 29 (b).

In an action brought by respondents for the recovery of the sum of \$262.14 paid out by them for macadam work on a piece of road fronting the appellant's lands, the work of macadamizing the said road and keeping it in repair being imposed by a by-law of the Municipal Council of the respondents, the appellants pleaded the nullity of the by-law. On appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) dismissing the appellant's plea,

Held, that the appellant's rights in future as to the obligation

to repair the road not being "future rights" within the meaning of sec. 29 (b), the case was not appealable. *County of Verchères v. Village of Varennes* (19 Can. S. C. R. 365) followed, and *Reburn v. Ste. Anne* (15 Can. S. C. R. 92) overruled. Gwynne, J., dissenting.

Appeal quashed with costs.

Bastien & Fortin, for appellants.

Ouimet & Emard, for respondents.

Nova Scotia.]

June 28, 1892.

SYDNEY & LOUISBURG RAILWAY CO. v. SWORD.

Dower—Defective title—Grant by Provincial Government of Dominion Lands—Estoppel—Local Act.

S. brought an action to recover dower out of lands conveyed to defendant company through another company from her husband. Defendants pleaded that the lands were part of the navigable waters of Sydney harbor, and were granted to plaintiff's husband by the Government of Nova Scotia contrary to the provisions of the B. N. A. Act, which vested such property in the Dominion Government. Plaintiff replied that defendants having obtained title through her husband, were estopped from denying that his title was valid. Defendants also relied on an act of the legislature of Nova Scotia passed in 1884, which enacted that the purchase and conveyance to the defendant company from their immediate grantors were absolutely ratified and confirmed, reserving to any person or persons the right to compensation only for any interest in or lien on the case.

Held, affirming the decision of the Supreme Court of Nova Scotia, Strong and Gwynne, JJ., dissenting, that the defendant company was estopped from saying that no title passed to plaintiff's husband by the grant from the Government of Nova Scotia or from questioning his title thereunder.

Held, further, that the act of 1884 did not affect plaintiff's claim. The statute was not pleaded, but if it was not necessary to plead it, it could not operate to vest in defendants property belonging to the Dominion Government, which the property in question did.

Held, per Patterson, J., that though a paramount title might have been set up against both parties, it could not be asserted by the defendants.

Held, also, by the majority of the Court, that the grant to plaintiff's husband was in fee simple, and he had such seizin that dower would attach.

Appeal dismissed with costs.

W. B. Ritchie, for appellants.

Drysdale, for respondents.

Ontario.]

June 28, 1892.

WILLIAMS V. TOWNSHIP OF RALEIGH.

Municipal Corporation—Exercise of Municipal Powers—Municipal Act (R. S. O. 1887) c. 184, ss. 483, 569, 583, 586—Drainage of flooded lands—Lands injuriously affected—Remedy—Arbitration—Mandamus—Notice.

Certain lands in the Township of Raleigh were drained by what were called The Raleigh Plains drain and Government Drain No. 1. The rate-payers petitioned for further drainage under the Mun. Act (R. S. O. 1887, c. 184), and a surveyor was directed, under sec. 569 of the act, to examine the locality, make plans and report if and how the drainage could be effected. In pursuance of his report the municipality caused a number of drains to be constructed leading into the Raleigh drain and Government Drain No. 1, with the result that the additional volume of water proved too great for the capacity of the latter, which overflowed and flooded the adjoining lands of C., who brought an action for the damage thereby occasioned. The matter was referred to a County Court judge who reported the facts in favor of C., and against the contentions of the municipality, and estimated the damages at \$850. Ferguson, J., affirmed this finding and also ordered a mandamus to issue under sec. 583 of the act. The Court of Appeal reversed this decision, holding that the only remedy for the damage to C.'s land was by arbitration under the statute, and that he was not entitled to a mandamus.

Held, reversing the judgment of the Court of Appeal, that the right infringed by the municipality being a common law right and not one created by the statute, S. was not deprived of his right of action by sec. 483 of the act, which provides for the determination by arbitration of a claim for compensation for lands injuriously affected by the exercise of municipal powers.

Held, further, that the Municipal Council had a discretion to

exercise in regard to the adoption, rejection or modification of the report of a surveyor appointed under sec. 569 to examine the locality and make plans, etc., and if the report is adopted the Council is liable for the consequences following from any defect therein.

Held also, that the Council, by the manner in which the drainage work was executed, was guilty of a breach of the duty imposed on it by sec. 583 of the act, to preserve, maintain and keep in repair such work after its construction.

The work having been constructed under sec. 583 of the act, C. was not entitled to a mandamus to compel the municipality to make necessary repairs to preserve and maintain the same, the notice required by that section not having been given. If the work had been done under sec. 586 notice would not have been necessary.

Per Strong and Gwynne, JJ.—C. was not entitled to the statutory mandamus, but it could be granted under the Ont. Jud. Act (R. S. O. 1887, c. 44).

Held, also, that though sec. 583 makes notice a necessary preliminary to the liability of the municipality to pecuniary damage suffered by a person whose land is injuriously affected by neglect or refusal to repair, the want of such notice did not divest C. of his right of action nor affect the damages awarded to him.

Appeal allowed with costs and judgment of

Ferguson, J., restored, except as to mandamus.

Christopher Robinson, Q.C., & Douglas, Q.C., for appellants.

Wilson, Q.C., for respondents.

British Columbia.]

June 28, 1892.

CAMERON V. HARPER.

*Executor—Action against—Legacy—Trust—Claim on assets—
Charge on realty.*

T. H. and his brother were partners in business, and the latter having died, T. H. became by will his executor and residuary legatee. A legacy was left by the will to E. H., part of which was paid and judgment recovered against the executor for the balance. T. H. having encumbered both his own share of the property and that devised to him, one of his creditors, and a mortgagee of the property, obtained judgment against him and procured the appointment of receivers of his estate. E. H. then

brought an action to have it declared that his judgment for the balance of his legacy was a charge upon the monies in the receivers' hands in priority to the personal creditors of T. H.

Held, affirming the judgment of the Court below, that it having been established that the monies held by the receivers were assets of the testator, or the proceeds thereof, E. H. was entitled to priority of payment though his judgment was registered after those of the other creditors.

Held, also, that the legacy of E. H. was a charge upon the realty of the testator, the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and the words "property" and "estate" being sufficient to pass realty. This charge upon realty operated against the mortgagees who were shown to have had notice of the will.

Christopher Robinson, Q.C., for the appellants.

S. H. Blake, Q.C., for the respondents.

Nova Scotia.]

June 28, 1892.

CUNNINGHAM V. COLLINS.

Mortgage—Foreclosure suit—Parties—Lessee of mortgagor—Protection of rights of—Practice.

In an action for foreclosure and realization of mortgages, the original defendants were the administrator, heirs at law and certain devisees of the mortgagor, subsequent incumbrancers, namely judgment creditors of some of the heirs, and the lessee of a part of the mortgaged property by lease from some of the heirs, not being joined. None of the defendants appeared, and an order was made foreclosing the equity of redemption, and directing the lands to be sold unless the amount due on the mortgage was paid before the day fixed for the sale. The sale was to be advertised in a newspaper and by hand-bills, copies of said hand-bills to be mailed to each of the subsequent incumbrancers. By a subsequent order the property was to be sold in two separate lots, the Queen Hotel property, which was that under lease, to be sold first. By a further subsequent order made on the day fixed for the sale, on application of Mrs. S., the lessee of the Queen Hotel, it was ordered that upon payment into Court by S. & K. of \$37,019,

proceedings by plaintiffs should be stayed until further order, and plaintiffs should assign to S. & K. the mortgages and lands free from incumbrance and also the suit and all the benefit of the proceedings therein, plaintiffs to be paid their claim out of money so paid into Court. This order was complied with.

On December 26, 1889, defendants moved to rescind the last mentioned order. The motion was refused and the order amended by a direction that Mary I. Sheraton, the lessee of the Queen Hotel, should be made a defendant to the action, and that S. & K. should be joined as plaintiffs and the stay of proceedings removed. The lessee, Mrs. Sheraton, then filed a statement of defence setting out a lease of the hotel property from three of the mortgagor's heirs to her for five years, subject to renewal for a further term of five years, and that she had entered into possession and made large repairs and improvements.

On January 4th, 1890, another order was made amending the order of sale by directing that the Queen Hotel property be sold subject to the rights of Mrs. Sheraton under the lease and subject to said lease.

From these orders of 26th December, 1889, and 4th January, 1890, defendants appealed to the Supreme Court of Nova Scotia sitting in banc, which Court affirmed the former order but set aside the latter. Both parties appealed to the Supreme Court of Canada.

Held, affirming the decision of the Court below, that the order of 26th December, 1889, was a proper order. It stayed the proceedings at the instance of a person having a substantial interest in the equity of redemption of part of the mortgage lands, and if the proposed sale had been under a writ of *fi-fa*, an injunction might have been granted to restrain it; and it only stayed them on payment into Court of the redemption money. As to the direction in the order for assignment of the mortgages and property by the plaintiffs, the defendants have no *locus standi* to object, and as to the addition of parties, defendants could not be prejudiced thereby. The order also removed the stay of proceedings, but the present appellants cannot take exception to that part of it, and the rights of subsequent incumbrancers who are not before the Court cannot be prejudiced by what was done in their absence.

Held, further, reversing the decision of the Court below, that the order of the 4th of January, 1890, was a proper order. Whatever rights the lessee had acquired under the lease she had

acquired as a purchaser for valuable consideration of the equity of redemption *pro tanto*, and the Court should endeavor to preserve those rights.

Appeal dismissed as to order of 26th
December, 1889, and allowed as to
order of 4th January, 1890.

Ross, Q.C., for appellant.

W. B. Ritchie, for respondent.

CREMATION—BURIAL SERVICE.

At a sitting of the Consistory Court of London, held in St. Paul's Cathedral on July 29, Dr. Tristram, Q.C., Chancellor of the Diocese of London, gave judgment in this case, which was an application for a faculty to authorise the removal of the remains of Lieutenant-Colonel Dixon from Kensal Green Cemetery to the Woking Crematorium, with a view to their being there cremated and the ashes subsequently deposited in an urn and returned to their present place of burial.—The Chancellor of London, in giving judgment, said: In this case the Court is asked to grant a faculty to enable the remains of Lieutenant-Colonel Dixon, late of 18 Seymour street, Portman Square, to be removed from the consecrated cemetery at Kensal Green to the Woking Crematorium, with a view to their being there cremated, and to the ashes of the remains being afterwards deposited in an urn and returned to their present place of burial.—Colonel Dixon died as far back as the month of April, 1874, leaving a widow but no children. He left a will which contains no directions as to the mode or place of his burial, and the executors of the will are dead. The petitioner for the faculty is his widow. She states in her affidavits that she is in feeble health, and that she has given directions that upon her death her remains are to be cremated at Woking and afterwards deposited in an urn and placed in the mausoleum in which the remains of her husband now rest, and that she is desirous that his remains should be similarly dealt with. She states, also, that in conversations which she had with him he expressed approval of the disposal of the dead by cremation, and that he gave her leave to dispose of his remains as she should think proper, either by burial or cremation, and that when his remains were deposited in the cemetery she intended that they should be subsequently cremated as well as her own. There are only two

cases in the reports which bear directly on the subject of cremation. The one is that of *Regina v. Price*, 53 Law J. Rep. M. C. 51; L. R. 12 Q. B. Div. 247, in which Mr. Justice Stephen held that it was not a misdemeanor to burn a dead body unless it were done so as to amount to a public nuisance or with a view to prevent a coroner's inquest being held upon it. The other is that of *Williams v. Williams*, 51 Law J. Rep. Chanc. 385; L. R. 20 Chanc. Div. 659. Having referred to the circumstances of that case the chancellor said: The law as laid down by Mr. Justice Fry and in other cases, is that, as there can be no property by the law of this country in a dead body, a person cannot dispose of his body by will, and that after death the custody and possession of the body belongs to the executors until it is buried, and when it is buried in consecrated ground it remains under the protection of the Ecclesiastical Court of the diocese, and cannot be removed from the grave or vault or mausoleum in which it has been placed except under a faculty granted by an Ecclesiastical Court, and then only to another grave or vault in consecrated ground. Mr. Dibdin, in moving for the faculty, submitted that, although there was no precedent for the application, it might be granted to gratify the wishes of the widow in like manner as the Court would grant a faculty for the removal of remains from one part to another part of the churchyard, or from one churchyard to another churchyard, in deference to the wishes of members of the family, unless the deceased has left contrary directions in his will. Where the deceased has left no testamentary or clear directions as to the place of his burial, the practice of the Court is to grant a faculty to proper parties on reasonable grounds shown, and subject to proper precautions, to remove the remains to another grave or vault in the same or in another churchyard; but where the deceased has himself expressed a wish to be buried in that or in any other churchyard, the invariable practice of the Court is by a faculty to give effect to such wish. Thus, in referring to the register of the Court, I observe that in June, 1775, Sir William Wynne, on the application of the executors of Elizabeth Raiss, whose remains had been interred by them in August, 1774, in a brick grave in the churchyard of Staines, decreed a faculty for their removal to a brick grave in the churchyard of St. Mary, Lambeth, on the ground that since the burial the executors had learnt that whilst living she had declared that she wished to be interred in the church or churchyard of the last named parish. Again, in *Smith v. Roberts*

(not reported, which was heard in this Court in November, 1877, the question of the amount of weight to be given to the expressed wishes of the deceased on an application for a faculty for the removal of her remains to New Zealand was argued before me at considerable length and fully considered. In that case Miss Annie Villeneuve Smith had come over to this country from New Zealand in November, 1876, with her father and mother, and died in the following April in London. During her last illness she extracted repeated promises from her mother that in case it terminated fatally she would take care that she was buried in a particular spot in the churchyard of St. Barnabas, Warrington, New Zealand, the church of which had been erected by donations from and by subscriptions collected by her family. Her remains had been temporarily deposited at the time of her funeral in the catacombs of Kensal Green, marked 'For removal,' with a view to their reinterment in the churchyard at Warrington. Her mother applied for a faculty for their removal for this purpose. Her application was opposed at the instance of the representative in this country of her father (who was then on his way out to New Zealand), on the ground that the daughter, though of age, had died a spinster and intestate, and that her father was therefore her personal representative; that he had paid for her funeral expenses, and contemplated erecting a family mausoleum in England, to which he would wish to remove the remains of his daughter. The mother answered that she had offered to pay the expenses of the funeral out of her own separate income, but that her husband insisted upon defraying them himself; that she was prepared to recoup him for the expenses he had incurred and to defray herself the cost of the removal and reinterment in New Zealand. At the close of the argument I expressed a strong opinion that it was the duty of the Court in such a case to give effect to the wishes of the deceased; but, being reluctant, in the father's absence, to give a decree against him, I directed a copy of the evidence, with an intimation of my opinion thereon, to be transmitted to him, and postponed giving judgment until he had been communicated with. In the result the father withdrew his opposition, and on November 4, 1878, I ordered the faculty to issue. There are objections which appear to the Court to be fatal to the present application. In the first place, Mrs. Dixon does not by her evidence show that what she now asks the Court to assist her in doing is what her husband wished to be done. He gave her the option of disposing of his remains in one of two

ways—either by burial or cremation. She elected to dispose of them by burial, and eighteen years afterwards she asks the Court to assist her to exercise the second alternative—namely, that of cremating them. But the exercise of the second alternative is in excess of the power intended to be conferred on her by her husband, who might, from sentiment or otherwise, reasonably have objected to his remains being thus dealt with. In the next place by ecclesiastical as well as by common law, the body of every person dying in this country, with certain exceptions, is entitled to Christian burial (see Lord Stowell, *Gilbert v. Buzzard*, 2 Hagg. Con. Rep. 343; *Regina v. Stewart*, 12 A. & E. 773). Can an executor, to gratify his own fancy without the deceased's sanction, cremate the body of his testator and so deprive it of being buried in the state and condition contemplated by this rule of law? In the opinion of the Court he would not be warranted in so acting, and if this be so the Court would not be justified in giving him the aid of its process to enable him so to act unless it were satisfied that it would be thereby assisting him in giving effect to the wishes of the deceased. But the Court, upon the evidence before it, is not satisfied that the granting of this application would accord with the intentions of Colonel Dixon. Lastly, one result of being buried in consecrated ground is that the site is under the exclusive control of the Ecclesiastical Courts, and no body there buried can be moved from its place of interment without the sanction of a faculty, to be granted upon the application of the executors or members of the family for reasons approved of by the Court, or upon the application of other parties upon the ground of necessity or of proved public convenience, and then only for reinterment in other consecrated ground. The Court is of opinion that it would not be justified in making a departure from this rule, which has now existed for centuries, for the purpose of enabling a body to be removed after burial for cremation. When burial in consecrated ground and cremation are both desired, cremation should precede and not follow burial. The burial service does not contemplate cremation. But where a body has been consumed in a fire it has been customary to collect the ashes and to bury them in a churchyard, accompanied with the use of the Office for the Burial of the Dead, and there does not appear to the Court to be any legal objection to the same course being followed where there has been a previous cremation in pursuance of directions left by the deceased. With every desire to accede to the wishes of Mrs. Dixon, the Court is bound to refuse to grant the faculty prayed.

WORK OF THE CIVIL COURTS.

"Barrister" writes to the *Gazette* as follows :—

In a few weeks our civil courts will resume their work and, in all probability, unless some reforms are instituted, we shall have a renewal of the complaints that these labors are inefficiently and carelessly performed, and a repetition of the efforts of Bench and Bar each to saddle the other with the blame for the wretched and slipshod way in which business is carried on.

It seems to me that, with a little give and take, with a disposition on both sides to accommodate, much might be done to expedite litigation.

The institution of the Summary court was an excellent move, and with judges sitting in it who understand that its main idea should be celerity, not only in trying, but in adjudging, cases on its calendar, it does its work well.

Suggestion first—Let only such judges as are in the habit of rendering speedy decisions be assigned to this court by the Chief Justice. Judges who have to deliberate can sit in the Merits division, the cases in which may fairly be presumed, by the mere fact of being on that list, not to be so urgent as those on the Summary roll.

Suggestion second—The Practice Court is a useful waster of the lawyer's time. Let this court sit every day—two judges being assigned to it; the chamber judge to relieve either practice judge, should he find himself burdened with more cases than he can expeditiously dispose of.

Suggestion third—In the Enquête and Merits court, both Bench and Bar should be more punctual. The court should sit from 10.30 till 1, and from 2 till 4. The time of the court should not, on trial days, be taken up by judgments. When a judge finds that he has more cases under advisement than he can conveniently consider and adjudge, let him apply to the Chief Justice for relief. We have lots of judges, and if their work is properly distributed and each labors to clear the calendar, much can be accomplished.

Suggestion four—This one to the Bar. When a case is inscribed, the assumption should be that it is intended to be tried and concluded. If not, then remove it at once or notify the clerk well in advance so that some other case may be put on the list in its place.

Suggestion five—To the Prothonotary. Have the lists prepared at the earliest possible moment; have the records ready, say two days in advance.

I believe, after an experience of some years, here and elsewhere, that if attention is paid to the above simple hints, the reproach from which we now suffer may be easily effaced.

GENERAL NOTES.

FOREIGN MARRIAGES.—The much-needed Foreign Marriage Act, 1892, (55 & 56 Vict. c. 23), 'to consolidate enactments relating to the marriage of British subjects outside the United Kingdom' has reduced the law of this subject to a fairly intelligible code. The two Consular Marriage Acts of 1849 and 1868, the Marriage Act, 1890, and the Foreign Marriage Act, 1891, are all wholly repealed, and, except as repealed before, re-enacted, the new statute containing twenty-seven sections. It is to be regretted, however, that the powers given to the Privy Council to make 'marriage regulations' have not been curtailed. Section 21 of the new Act repeats section 9 of the Act of 1890, and sections 5 and 10 of the Act of 1891, enacting, amongst other things, that the marriage regulations may 'modify in special cases or classes of cases the requirements of this Act as to residence and notice, so far as such modifications appear to Her Majesty to be consistent with the observance of due precautions against clandestine marriages,' and also may 'make such provisions as seem necessary or proper for carrying into effect this Act or any marriage regulations.' It is difficult to say what marriage regulations would not be within the scope of this very extensive provision. Section 26, we may add, specially provides that any Order in Council in force under any Act repealed by the new Act shall continue in force as if made in pursuance of the new Act, which has the effect of 'saving' the important 'Foreign Marriages Order in Council, 1890,' made on November 22, published in the *London Gazette* of November 25 of that year.—*Law Journal* (London).

THE CANADIAN CRIMINAL CODE.—Lord Stanley of Preston, as Governor-General of Canada, recently congratulated the Parliament of that colony on having passed a Criminal Code Bill. This bill, as presented to the colonial Legislature, contained no less than 1,005 clauses. Amongst them are three very important ones dealing with the right of an accused person to give evidence on his own behalf. Fifteen offences, none of them very serious, are selected, and with regard to these it is provided that the evidence of the accused is to be admissible, and a like provision is made with regard to charges of more serious offences, with respect to which the only case made out is one of common assault; but, with these exceptions, the rule of the English common law (which successive law officers have so very frequently and vainly tried to alter on this side of the Atlantic) is re-enacted, to the effect that no person charged in any criminal proceeding is to be rendered competent or compellable to give evidence for or against himself. This contrasts strangely with the course taken by the Victorian Parliament, on which we recently commented, of entirely abrogating the common law rule as to all offences whatever, with certain restrictions as to procedure.—*Ib.*

THE LEGAL NEWS.

VOL. XV.

OCTOBER 1, 1892.

No. 19.

SUPREME COURT OF CANADA.

OTTAWA, June 28, 1892.

New Brunswick.]

NORTH BRITISH & MERCANTILE INS. CO. v. McLELLAN.

Fire Insurance—Insurable interest—Property in goods—Construction of contract—Statement in application—Warranty or representation—Breach of condition—Evidence.

By a contract in writing M. agreed to cut and store a certain quantity and description of ice, the said ice houses and all implements to be the property of P. who, after the completion of the contract was to convey the same to M.; the ice was to be delivered by M. on board vessels to be sent by P. during certain months; P. was to be liable to accept and pay for only good merchantable ice delivered and stowed as agreed. The property on which the buildings for storing said ice were situate was leased to P. by the owner, the lease containing a covenant by the owner to grant a renewal to M. A bill of sale was made by him to a third party of the buildings on said land. M. effected insurance on the whole stock of ice stored, and in his application, to the question, does the property to be insured belong exclusively to applicant, or is it held in trust or on commission, or as mortgage? "he answered: Yes, to applicant." The application contained a declaration that the same was a just, full and true exposition of all the facts and circumstances in regard to the condition of the property so far as known to the applicant and so far as material to the risk, and it was to form the basis of the liability of the company.

The property insured was destroyed by fire, and payment of

the insurance was refused on the ground that the property belonged to P., and not to M. In an action on the policy, the defendants endeavoured to prove that other insurance on the same property had been effected by P., and set up a condition in the policy that in such case the company should only be liable to pay its ratable proportion of the loss. This condition was not pleaded, and the policies to P. were not produced nor the terms of his insurance proved. Evidence was given, subject to objection as to its admissibility, that P. had effected insurance to cover advances made to M. on the ice, and had been paid his loss. The plaintiff obtained a verdict for the full amount of his policy, which was affirmed by the Supreme Court of New Brunswick in banc.

Held, affirming the decision of the Court below, that the whole property in the ice insured was in M.; that the clause in the agreement stating that the ice houses and implements were to be the property of P. meant that the buildings and implements only were to pass to P. as he was to convey the property vested in him by the agreement to M. on completion of the contract, and could not so convey the ice, which M. was to deliver on board vessels, and which he could not do unless it was his property.

Held, further, that the declaration in the application did not make M. pledge himself to the truth of the statements therein absolutely, but only so far as known to him and as material to the risk, and questions of materiality and knowledge were for the jury who found them in favour of M.

Held, also, Strong, J., dissenting, that the declaration was not a warranty of the truth of the statements, but a mere collateral representation.

Per Strong, J.—It was a warranty, but as it was confined to matters within the knowledge of M. and material to the risk, the result is practically the same.

Held, as to the further insurance, that the condition should have been pleaded, but if available without plea it was not proved; what evidence was given should not have been received.

Per Strong, J.—It was not shown that P.'s insurance was on the ice insured by M., who was not bound to deliver any specific ice under the contract.

Per Gwynne, J.—The damages should be reduced by the amount received by P.

Appeal dismissed with costs.

Weldon, Q.C., and *Jack* for appellants.

F. E. Barker for respondent.

June 28, 1892.

Ontario.]

TOWNSHIP OF SOMBRA v. TOWN OF CHATHAM.

Municipal corporation—Drainage work—Non-completion—Mandamus—Ontario Mun. Act (R.S.O., 1887, c. 184, s. 583—Ont. Jud. Act (R.S.O., 1887, c. 44.)

The corporation of the town of C., by by-law, undertook the execution of a scheme of drainage on a road between the town of C. and the township of S., pursuant to a report of an engineer appointed to examine the land proposed to be drained. A surveyor was appointed to execute the work by letting it out under contract, which he did, but the contractors were unable to carry it out, and abandoned it. The work was then let in parcels to different contractors. An action was brought against the town of C. by the township of S. and one M., a landowner whose land was alleged to have been injured by flowing caused by the wrongful and negligent manner in which the drainage work was done. The plaintiffs claimed that the work was never fully executed, and each asked for a *mandamus* to compel the defendants to complete it according to the plans and specifications adopted by the by-law. M. also claimed damages for the injury to his land.

The trial resulted in a judgment for plaintiffs for all the relief claimed, the decree directing that the work be completed according to the plans and specifications with proper and sufficient outlets at both ends of the drain to carry off all the water entering the same from time to time, the same to be done at the cost of the defendants. To M. was awarded \$150 damages. The Court of Appeal (18 Ont. App. R. 252) reversed this judgment so far as the township of S. was concerned, and dismissed the action of the township. The judgment in favour of M. was affirmed. The plaintiffs appealed and the defendants gave notice of cross-appeal against the judgment in favor of M.

Held, reversing the judgment of the Court of Appeal, Taschereau, J., dissenting, and Patterson, J., with hesitation, that the township of S. was entitled to retain the *mandamus* or mandatory injunction granted by the original decree, and that it was entitled to such relief, irrespective of s. 583 of the Mun. Act (R.S.O. 1887, c. 184), under the Ont. Jud. Act (R.S.O. 1887, c. 44); the decree to be varied by striking out the direction that the work should be done at the cost of defendants, which is only

warranted where the original assessment was sufficient to cover the cost, and the fact that the contractors were unable to do the work could only be explained on the assumption that the amount was insufficient; the decree to be further varied by striking out the provision as to outlets, and to direct a mandatory injunction to issue requiring defendants to complete the drain to the width and depth and in the manner provided by the said plans and specifications, or providing some substitution therefor under the statute, reserving leave to plaintiffs to apply for further relief as occasion may require if the work is not proceeded with as directed.

Under s. 583 of the Mun. Act, a *mandamus* only issues where one of two municipalities bound to repair refuses to do so after notice. In such case *mandamus* is a remedy in addition to an action by the owner of property injured by such refusal. Damage from neglect after notice is conclusive evidence of negligence.

The section has no reference to a case in which the drainage work has never been fully completed.

The township of S. could not claim pecuniary compensation for negligence causing injury to private land or even causing a general nuisance. Its right to such compensation is confined to cost of repairing and restoring roads washed away by floods caused by such negligence.

Appeal allowed with costs and cross-appeal dismissed.

Meredith, Q.C., for appellants.

Pegley, Q.C., for respondents.

June 28, 1892.

Ontario.]

PENMAN MFG. CO. v. BROADHEAD.

Contract—Manufacture of patented articles—Substitution of new agreement for—Evidence.

B. was the patentee of a machine called the Windsor Loom, for making skirtings, etc., and in 1884 she entered into an agreement with the defendant company to supply them with the looms on which they were to manufacture the goods and pay a royalty of one cent a square yard thereon, the minimum of such royalty to be \$50 a month. The patent of B. was to expire in 1891. Prior to this agreement, in 1882, B. had granted to P., the head of the defendant company, a license to manufacture blankets under another

patent for a like royalty. These agreements were carried out until 1887. In the meantime B. had patented another device for making blankets, and considerable correspondence had taken place between her and the company with regard to the manufacture of the latter patented article, and the company, who had been unable to sell the skirtings, offered to take both patents for a year, paying therefor \$1,000 royalty, which B. accepted. At the end of the year B. claimed that the original agreement was still in force and was to continue until the patent expired, and she brought an action for royalties due her under the same.

Held, reversing the judgment of the Court of Appeal, Taschereau, J., dissenting, that the correspondence and other evidence showed that the agreement made in 1887 was in substitution for, and superseded the original agreements, and B. had no right to claim any royalty under the latter.

Appeal allowed with costs.

Crerar, Q.C., for appellants.

Masten & Moffatt for respondent.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, July 30, 1892.

Coram LORD WATSON, LORD HANNEN, LORD MACNAGHTEN, LORD SHAND, LORD MORRIS, SIR RICHARD COUCH.

CITY OF WINNIPEG V. BARRETT.—CITY OF WINNIPEG V. LOGAN.*

Constitutional law—The Manitoba and B. N. A. Acts—Denominational schools in Manitoba—Right of Roman Catholic or English Church thereto—Manitoba Schools Act of 1890.

1. *The Manitoba Public Schools Act of 1890, 53 Vic. cap. 38, is intra vires of the Legislature of that Province.*
2. *The provisions of subsections 2 and 3 of section 22 of the Manitoba Act do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.*
3. *The establishment of a national system of education upon an unsectarian basis is not so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other.*

4. *There were no rights or privileges with respect to denominational schools existing by law or practice in Manitoba at the time of the Union with Canada, which were prejudicially affected by said Public Schools Act.*
5. *The schools established by said Act are not Protestant schools but unsectarian schools, and no right or privilege of any denomination is prejudicially affected by the fact that, owing to religious convictions, its members feel compelled to support their own separate schools, and find themselves unable to partake of the advantages of the public unsectarian schools for which they are taxed in common with other denominations.*
6. *The word "practice" in subsection 1 of section 22 of the Manitoba Act is not to be construed as equivalent to "custom having the force of law."*

The Manitoba Act, sec. 22, provides :

In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions :

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the union.

(2) An appeal shall lie to the Governor-General in Council from any act or decision of the legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(3) In case any such Provincial law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council on any appeal under the section is not duly executed by the proper Provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

The B. N. A. Act, sec. 93, provides :

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the union.....

By the "Act respecting the Public Schools" and the "Act respecting the Department of Education," both assented to on March 31, 1890, the Legislature of Manitoba purported to abolish the system of Separate Schools for Protestants and Roman Ca-

tholics, which at that time was in existence in said Province, and established instead a system under which the public schools were organized in all the school districts without regard to the religious views of the ratepayers.

The City of Winnipeg on July 14, 1890, passed a by-law, No. 480, to authorize an assessment for city and school purposes in that city for the current municipal year. On July 28 another by-law, No. 483, was passed amending the former by-law.

On October 7, 1890, one John Kelly Barrett, a Roman Catholic ratepayer of said city, obtained, under Municipal Act, 53 V., c. 51, s. 258, a summons for an order to quash said by-laws for illegality, and that upon the following among other grounds:

1. That because by the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum."

No other ground was stated.

On November 24, 1890, the Hon. Mr. Justice Killam delivered judgment in the matter and made an order dismissing the summons with costs. (1 W. L. T. 157.)

The applicant appealed to the Full Court of Queen's Bench for Manitoba from the judgment of Killam, J., and on February 2, 1891, the last mentioned Court, (Taylor, C. J., Dubuc and Bain, JJ.,) gave judgment dismissing the appeal with costs, Dubuc, J., dissenting. (1 W. L. T. 195.)

Barrett thereupon appealed to the Supreme Court of Canada, which on October 28, 1891, gave judgment unanimously in his favour, over-ruling the judgments of the Manitoba Courts.

Shortly thereafter the respondent Logan, a member of the Church of England, and a ratepayer, made application to quash by-law No. 514, of the city of Winnipeg, for levying and raising the assessment for the year 1891, on the grounds "(1) That by the said by-law the amount estimated to be levied for school expenditure is levied upon members of the Church of England and all other religious denominations alike. (2) That it is illegal to assess members of the Church of England for the support of schools which are not under the control of the Church of England, and in which there are not taught religious exercises prescribed by said church."

The affidavit filed in support of the application alleged that at the time of the union with Canada of what is now the province of Manitoba, there were in operation a number of parochial

schools, in which the distinctive principles and doctrines of the Church of England were taught, and which were supported by members of that church, and out of the funds of the church.

The Full Court of Queen's Bench for Manitoba on December 14 last, gave judgment in the applicant's favour, following the Supreme Court's decision in *Barrett v. Winnipeg, supra*, and holding that the members of the Church of England in Manitoba had the same right to denominational schools as the Roman Catholics. (3 W. L. T. 11.)

The City of Winnipeg appealed from the judgment of the Supreme Court in the first case and from the judgment of the Court of Queen's Bench, founded on that of the Supreme Court, in the second.

The appeals were argued (July 12-15) before the above members of the Committee.

Sir Horace Davey, Q. C., Dalton McCarthy, Q. C. (Canadian Bar), and *Joseph Martin*, (Canadian Bar) for the appellants.

The Attorney General, S. H. Blake, Q. C., (Canadian Bar) *J. S. Ewart, Q. C.,* (Canadian Bar) and *F. C. Gore* for respondent Barrett.

Ram for respondent Logan.

The facts, other than those above stated, sufficiently appear in the judgment which was delivered by Lord Macnaghten as follows:—

LORD MACNAGHTEN :—

These two appeals were heard together. In the one case the City of Winnipeg appeals from a judgment of the Supreme Court of Canada, reversing a judgment of the Court of Queen's Bench for Manitoba, and in the other from a subsequent judgment of the Court of Queen's Bench for Manitoba, following the judgment of the Supreme Court. The judgments under appeal quashed certain by-laws of the City of Winnipeg, which authorized assessments for school purposes in pursuance of the Public Schools Act, 1890, a statute of Manitoba to which Roman Catholics and members of the Church of England alike take exception. The views of the Roman Catholic Church were maintained by Mr. Barrett, the case of the Church of England was put forward by Mr. Logan. Mr. Logan was content to rely on the arguments advanced on behalf of Mr. Barrett, while Mr. Barrett's advisers were not prepared to make common cause with Mr. Logan, and naturally would have been better pleased to stand alone. The controversy

which has given rise to the present litigation is, no doubt, beset with difficulties. The result of the controversy is of serious moment to the Province of Manitoba, and a matter apparently of deep interest throughout the Dominion. But in its legal aspect the question lies in a very narrow compass. The duty of this board is simply to determine as a matter of law whether, according to the true construction of the Manitoba Act, 1870, having regard to the state of things which existed in Manitoba at the time of the Union, the Provincial Legislature has or has not exceeded its powers in passing the Public Schools Act, 1890. Manitoba became one of the provinces of the Dominion of Canada under the Manitoba Act, 1870, which was afterwards confirmed by an Imperial Statute, known as the British North America Act, 1871. Before the Union it was not an independent province, with a Constitution and a Legislature of its own. It formed part of the vast territories which belonged to the Hudson's Bay Company and were administered by their officers and agents. The Manitoba Act, 1870, declared that the provisions of the British North America Act, 1867, with certain exceptions not material to the present question, should be applicable to the province of Manitoba, as if Manitoba had been one of the provinces originally united by the Act. It established a Legislature for Manitoba, consisting of a Legislative Council and a Legislative Assembly, and proceeded, in section 22, to re-enact with some modifications, the provisions with regard to education which are to be found in section 93 of the British North America Act, 1867. Section 22 of the Manitoba Act, so far as it is material, is in the following terms :

" In and for the province the said Legislature may exclusively
" make laws in relation to education, subject and according to
" the following provisions :

" (1) Nothing in any such law shall prejudicially affect any
" right or privilege with respect to denominational schools which
" any class of persons have by law or practice in the province at
" the Union."

Then follow two other subsections. Subsection 2 gives an " appeal," as it is termed in the Act, to the Governor-General in Council from any act or decision of the Legislature of the province or any provincial authority " affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." Subsection 3 reserves certain limited powers to the Dominion Parliament in the event of the

Provincial Legislature failing to comply with the requirements of the section or the decision of the Governor-General in Council. At the commencement of the argument a doubt was suggested as to the competency of the present appeal in consequence of the so called appeal to the Governor-General in Council provided by the Act. But their Lordships are satisfied that the provisions of subsections 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country. Subsections 1, 2 and 3 of section 22 of the Manitoba Act, 1870, differ but slightly from the corresponding subsections of section 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in subsection 1, the words "by law" are followed by the words "or practice," which do not occur in the corresponding passage in the British North America Act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. It is not perhaps very easy to define precisely the meaning of such an expression as "having a right or privilege by practice." But the object of the enactment is tolerably clear. Evidently the word "practice" is not to be construed as equivalent to "custom having the force of law." Their Lordships are convinced that it must have been the intention of the Legislature to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools which any class of persons practically enjoyed at the time of the Union. What, then, was the state of things when Manitoba was admitted to the Union? On this point there is no dispute. It is agreed that there was no law, or regulation, or ordinance, with respect to education, in force at that time. There were, therefore, no rights or privileges with respect to denominational schools existing by law. The practice which prevailed in Manitoba before the Union is also a matter on which all parties are agreed. The statement on the subject by Archbishop Taché, the Roman Catholic Archbishop of St. Boniface, who has given evidence in Barrett's case, has been accepted as accurate and complete. "There existed," he says, "in the territory now constituting the Province of Manitoba a number of effective schools for children. These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic church, and others by various Protestant denominations. The means necessary for the sup-

“ port of Roman Catholic schools were supplied, to some extent,
“ by school fees, paid by some of the parents of the children who
“ attended the schools, and the rest were paid out of the funds
“ of the church contributed by its members. During the period
“ referred to Roman Catholics had no interest in, or control over,
“ the schools of the Protestant denominations, and the members
“ of the Protestant denominations had no interest in, or control
“ over, the schools of the Roman Catholics. There were no
“ public schools in the sense of State schools. The members of
“ the Roman Catholic Church supported the schools of their own
“ church for the benefit of the Roman Catholic children, and
“ were not under obligation to and did not contribute to the
“ support of any other schools.” Now, if the state of things
which the Archbishop describes as existing before the Union had
been a system established by law, what would have been the
rights and privileges of the Roman Catholics with respect to de-
nominational schools? They would have had by law the right
to establish schools at their own expense, to maintain their schools
by school fees or voluntary contributions, and to conduct them
in accordance with their own religious tenets. Every other reli-
gious body, which was engaged in a similar work at the time of
the Union would have had precisely the same right with respect
to their denominational schools. Possibly this right if it had
been defined or recognized by positive enactment, might have
had attached to it, as a necessary or appropriate incident, the
right of exemption from any contribution under any circumstan-
ces to schools of a different denomination. But, in their lord-
ships’ opinion, it would be going much too far to hold that the
establishment of a national system of education upon an unsect-
arian basis is so inconsistent with the right to set up and main-
tain denominational schools that the two things cannot exist
together, or that the existence of the one necessarily implies or
involves immunity from taxation for the purpose of the other.
It has been objected that if the rights of Roman Catholics, and
of other religious bodies, in respect to their denominational
schools, are to be so strictly measured and limited by the prac-
tice which actually prevailed at the time of the Union, they will
be reduced to the condition of a “ natural right ” which “ does
not want any legislation to protect it.” Such a right, it was said,
cannot be called a privilege in any proper sense of the word. If
that be so, the only result is that the protection which the Act
purports to extend to rights and privileges existing “ by prac-

tice" has no more operation than the protection which it purports to afford to rights and privileges existing "by law." It can hardly be contended that in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection. Manitoba having been constituted a province of the Dominion in 1870, the Provincial Legislature lost no time in dealing with the question of education. In 1871 a law was passed which established a system of denominational education in the common schools as they were then called. A board of education was formed, which was to be divided into two sections, Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Under the Manitoba Act the province had been divided into twenty-four electoral divisions for the purpose of electing members to serve in the Legislative Assembly. By the Act of 1871, each electoral division was constituted a school district, in the first instance. Twelve electoral divisions, "comprising mainly a Protestant population," were to be considered Protestant school districts; twelve, "comprising mainly a Roman Catholic population," were to be considered Roman Catholic school districts. Without the special sanction of the section there was not to be more than one school in any school district. The male inhabitants of each school district, assembled at an annual meeting, were to decide in what manner they should raise their contributions towards the support of the schools, in addition to what was derived from public funds. It is perhaps not out of place to observe that one of the modes prescribed was "assessment on the property of the school district," which must have involved, in some cases at any rate, an assessment on Roman Catholics for the support of a Protestant school, and the assessment on Protestants for the support of a Roman Catholic school. In the event of an assessment there was no provision for exemption, except in the case of a father or guardian of a school child, a Protestant in a Roman Catholic school district, or a Roman Catholic in a Protestant school district—who might escape by sending the child to the school of the nearest district of the other section and contributing to it an amount equal to what he would have paid if he belonged to that district.

The laws relating to education were modified from time to time, but the system of denominational education was maintained in full vigor until 1890. An act passed in 1881, following an act of 1875, provided among other things that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and a Roman Catholic district might include the same territory in whole or in part. From the year 1876 until 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school or a Roman Catholic ratepayer for a Protestant school. In 1890 the policy of the past 19 years was reversed, and the denominational system of public education was entirely swept away. Two acts in relation to education were passed. The first (53 Vict. c. 37) established a Department of Education and a Board consisting of seven members known as the "Advisory Board." Four members of the Board were to be appointed by the Department of Education, two were to be elected by the public and high school teachers, and the seventh member was to be appointed by the University Council. One of the powers of the Advisory Board was to prescribe the forms of religious exercises to be used in the schools. The Public Schools Act 1890 (53 Vict. c. 38) enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the act, and that all the public schools should be free schools. The provisions of the act with regard to religious exercises are as follows :

6. Religious exercises in the public schools shall be conducted according to the regulations of the Advisory Board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before any religious exercises take place.

7. Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and, upon receiving written authority from the trustees, it shall be the duty of the teachers to hold such religious exercises.

8. The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided.

The act then provides for the formation, alteration and union

of the school districts, for the election of the school trustees, and for levying a rate on the taxable property in each school district for school purposes. In cities the municipal council is required to levy and collect upon the taxable property within the municipality such sums as the school trustees may require for school purposes. A portion of the legislative grant for educational purposes is allotted to public schools; but it is provided that any school not conducted according to all the provisions of the act, or any act in force for the time being, or the regulations of the Department of Education, or the Advisory Board, shall not be deemed a public school within the meaning of the law and shall not participate in the legislative grant. Section 141 provides that no teacher shall use or permit to be used as text books any books except such as are authorized by the Advisory Board, and that no portion of the legislative grant shall be paid to any school in which unauthorized books are used. Then there are two sections (178 and 179) which call for a passing notice, because, owing apparently to some misapprehension, they are spoken of in one of the judgments under appeal as if their effect was to confiscate Roman Catholic property. They apply to cases where the same territory was covered by a Protestant school district and by a Roman Catholic school district. In such a case Roman Catholics were really placed in a better position than Protestants. Certain exemptions were to be made in their favour if the assets of their district exceeded its liabilities, or if the liabilities of the Protestant school district exceeded its assets. But no corresponding exemptions were to be made in the case of Protestants. Such being the main provisions of the Public Schools Act, 1890, their Lordships have to determine whether that act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the Union. Notwithstanding the Public Schools Act, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the Province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who attend. But then it is said that it is impossible for Roman Catholics or for members of the Church of England (if their views

are correctly represented by the Bishop of Rupert's Land, who has given evidence in Logan's case) to send their children to public schools where the education is not superintended and directed by the authorities of their church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault; it is owing to religious convictions, which everybody must respect, and to the teaching of their church, that Roman Catholics and members of the Church of England find themselves unable to partake of the advantages which the law offers to all alike. Their Lordships are sensible of the weight which must attach to the unanimous decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of the Union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act. They cannot assent to the view, which seems to be indicated by one of the members of the Supreme Court, that public schools under the Act of 1890, are in reality Protestant schools. The Legislature has declared in so many words that the public schools shall be entirely unsectarian, and that is carried out throughout the Act. With the policy of the Act of 1890 their Lordships are not concerned, but they cannot help observing that, if the views of the respondents were to prevail, it would be extremely difficult for the Provincial Legislature, which has been entrusted with the exclusive power of making laws relating to education, to provide for the educational wants of the more sparsely inhabited districts of a country almost as large as Great Britain, and that the powers of the Legislature which on the face of the Act appear so large, would be limited to the useful but somewhat humble office of making regulations for the sanitary condition of school houses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars, and matters of that sort. In the result their lord-

ships will humbly advise Her Majesty that these appeals ought to be allowed, with costs. In the *City of Winnipeg v. Barrett*, it will be proper to reverse the order of the Supreme Court with costs, and to restore the judgment of the Court of Queen's Bench for Manitoba. In the *City of Winnipeg v. Logan*, the order will be to reverse the judgment of the Court of Queen's Bench, and to dismiss Mr. Logan's application and discharge the rule nisi and the rule absolute with costs.

GENERAL NOTES.

CRIME IN THE UNITED STATES.—It has to be confessed that there is a larger number of crimes of violence committed in the United States than in any other civilized country in the world. The number of such crimes is out of proportion to the population. President Andrew D. White, in a lecture addressed at Chautauqua, discussed the whole problem in this country. The number of deaths by murder in the United States is more than double the average in the most criminal countries in Europe, and the number is increasing apparently in a ratio much greater than the population. In 1890 the number of reported murders was about four thousand; in 1891 very nearly six thousand. The chief explanation of these extraordinary numbers is even more ominous. The great majority of the murderers are at large; they never have been punished, and never will be. In 1891, with nearly six thousand murders, there were only one hundred and twenty-three inflictions of the death penalty, only one to forty-eight murders. It is evident that the lax administration of the law is a chief cause for what we discover. There are portions of our country where murderers are seldom punished. That is true in some of our large cities. The lax administration of the law and the delay which our local methods allow, are responsible for an enormous amount of the evil. Men kill and expect to go free, and they succeed. The *Charleston News* deserves great credit for its effort to expose the homicidal mania in South Carolina. It had occasion to record fifty-two murders in the first six months of last year, as a result largely of a lax administration of the law. We suppose there is, on an average, about one man lynched a day in the United States. To be sure these things are confined to sections of the country. In some portions we hear nothing of them, but the grand aggregate makes a record which is terrible to contemplate. We need legislation which shall make justice more swift and sure in the interests of the public instead of in the interests of the criminal, and then we need more elementary instruction in morals in all our schools, from the lowest to the highest, and more preaching of righteousness in our pulpits.—*The Independent*.

THE LEGAL NEWS.

VOL. XV.

OCTOBER 15, 1892.

No. 20.

CURRENT TOPICS AND CASES.

The September term of the Court of Appeal, at Montreal, commenced with a list of 138 inscriptions, showing work on hand for at least five terms, or one full year. If this list be cleared in the term of May next, together with the cases entitled to be heard by privilege, the Court will have accomplished a fair year's work. Considerable progress was made during the term, which was not broken by the occurrence of any holiday. Twenty-three cases were heard in full on the merits; one was submitted on the facts without oral argument; two were settled out of court; three appeals were dismissed on motion; and four appeals were declared abandoned, no proceeding having taken place within a year. The *délibérés* remaining over from the May term were all disposed of, with one exception in which the record was in an irregular condition. Thirteen cases were decided on the merits, in ten of which the appeal was dismissed unanimously; in one the judgment was reversed; and in two the judgment was reformed. The number of appeals dismissed unanimously may be considered to indicate several things; first, that the work in the courts below is performed with considerable care and with sound judgment; second, that the Appeal Court is not inclined to disturb the findings of the lower courts on questions of fact; third, that counsel should not institute an appeal

simply because they are dissatisfied with the first judgment; they must be prepared to give solid reasons for the faith which is in them.

The bulk of legislation in England is singularly small compared with what lawyers have to deal with in the United States, or even in the Dominion of Canada. The *London Law Journal* has counted the number of Acts during the past century, and the total is only 11,268, an average of 112 per annum. The number has been diminishing instead of increasing, the total for the twenty years ending 1889 being only 1687 against 2759 for the twenty years ending 1809. It must be remembered, however, that a considerable number of consolidation Acts have been passed in recent years. If it ever come about that the United Kingdom is split up into sections, with home rule established in each, the legislative output will soon show a marked increase.

Some figures given by Mr. Justice Cave, in an elaborate review published by him of the proposals of the Council of Judges, are of interest as showing the proportion of cases which are reported in England. An erroneous impression prevails here that under the official system of reporting in England, almost every decision—more particularly of the higher courts—appears in due course in the Law Reports. It will be seen that this is very far from being the case. Mr. Justice Cave gives the figures in detail for five years. We need not repeat all these figures, but simply take the average. It appears, then, that the yearly average of appeals from the Queen's Bench Division is as follows:—Final appeals, 125; interlocutory appeals, 123; original motions, 57; bankruptcy appeals, 48; total 348. Now, the yearly average of appeals from the Queen's Bench Division reported in the Law Reports is as follows:—Final appeals, 54; interlocutory appeals, 19; bankruptcy appeals, 16; total, 89.

Mr. Justice Cave says, "we may fairly conclude from this that the other 259 cases presented no features of general interest." It appears, therefore, that one case in five, even of the appeals, is all that appears in the reports.

In *Guy v. Paré*, June 25, 1892, the Court of Review at Montreal had to decide a point in reference to promissory notes, in which the principle of the civil law, if applicable, would lead to a conclusion at variance with the law of England. The question was whether the endorser is discharged by delay given to the maker by the creditor. Art. 2840, C.C., says that "in all matters relating to bills of exchange not provided for in this code, recourse must be had to the laws of England in force on the 30th May, 1849." The majority of the Court of Review held that this applied only to the form, negotiability and proof of the instrument, and not to matters of civil obligation resulting from the contract created thereby, in regard to which recourse must be had, in their opinion, to the provisions applicable thereto to be found in other parts of the code. Treating the endorser as a surety, the majority of the Court, Loranger and Tellier, J.J., reversed the judgment of Gill, J., and held that the endorser is not discharged by delay given to the maker by the creditor (Art. 1961, C.C.) Mr Justice Davidson dissented. This has been a controverted point in the past, but with respect to cases which may occur in the future, Section 8 of the Amending Act of 1891 appears to settle the question in the sense of the judgment of Mr. Justice Gill, for it is enacted that "the rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of the said Act (the Act of 1890) as hereby amended, shall apply, and shall be taken and held to have applied from the date when the said Act came into force, to bills of exchange, promissory notes and cheques." The effect of this clause will be to promote harmony of jurisprudence in the several provinces of the Dominion.

THE LATE CHIEF JUSTICE RITCHIE.

Sir Wm. Johnston Ritchie, Chief Justice of the Supreme Court of Canada, died at Ottawa, Sept. 25, as the result of a cold contracted while returning to the capital about two weeks previously.

The deceased was born at Annapolis, N.S., Oct. 28, 1813. He was educated at Picton, and studied law with his brother, who was afterwards Chief Judge of Equity in Nova Scotia. In 1838 he was called to the Bar of New Brunswick. In 1854 he was named Q.C. He represented St. John in the New Brunswick Assembly from 1846 till 1851, and from 1854 till August, 1855, when he was appointed a justice of the New Brunswick Supreme Court. He was for some time a member of the executive council of New Brunswick. In December, 1865, on the death of Hon. Robert Parker, he was appointed Chief Justice of New Brunswick.

On the 8th October, 1875, he was called to a seat on the Supreme Court bench, and in 1879 was elevated to the chief justiceship. On November 1, 1881, he had the honor of knighthood conferred upon him. Sir William Ritchie was twice married, first to Miss Strong, of St. Andrews, N.B., and, secondly, in 1854, to Grace Vernon, daughter of the late Thos. L. Nicholson, of St. John, and a step-daughter of the late Admiral Wm. F. Owen, R.N. He served as administrator of the Government of Canada for six months, from July, 1881, to January, 1882, during the absence of the Marquis of Lorne, and at other times during the absence of the Governor-General. He has taken an active part in the business of his Court, and his judgments have been distinguished by learning and ability.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, July 30, 1892.

Present:—LORDS WATSON, HOBHOUSE and SHAND.

CONNECTICUT FIRE INSURANCE CO. (plaintiff), appellant; and
KAVANAGH (defendant), respondent.

Principal and Agent—Fraud—Transfer of fire insurance risk—Contract—Agent—Powers of—Art. 1735, C. C.—Custom—Question raised for first time before court of last resort.

The respondent, an insurance broker, was the agent in Montreal of two foreign insurance companies, one of which instructed him to cancel a certain risk in Montreal which respondent had accepted. After suggesting a recom-

sideration, and the order being repeated, he complied, and then immediately transferred the risk to the other Company for which he was agent (the appellant), without informing them that the risk had been rejected by the first Company. He made the transfer, moreover, without the knowledge of the insured, and without notice to them. On the same day, and soon after the entries connected with the transaction had been made in the books, a fire occurred in the premises insured, and the loss was paid in ordinary course, after adjustment, by the Company to which the risk had been transferred. In an action afterwards brought by the latter against the respondent, to be reimbursed the amount of the loss, which they alleged they had paid without cause, and upon false representations by respondent:

HILD :—Affirming the judgment of the Court of Queen's Bench, *M. L. R.*, 7 *Q. B.* 323, that the transfer of the risk to the Company appellant having been made by respondent in good faith, before the fire occurred, and in accordance with the custom of insurance brokers in Montreal, the charge of fraud was not established, and as that was the only issue the appellant was entitled to raise, the action must be dismissed.—When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. But such a course ought not to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea.

LORD WATSON :—In this case the argument addressed to their Lordships was not confined to the points which were submitted for the decision of the Courts below. Before dealing with these controverted questions, whether old or new, it will be convenient to notice the facts which are not now in dispute.

The respondent, Walter Kavanagh, in the year 1888, acted as agent in Montreal for three different companies carrying on the business of fire insurance. A gentleman, named Warden King, had insured with him certain premises in Montreal, occupied as a paper-box factory, under a policy from one of these concerns, the British America Assurance Company, which expired on the 8th July, 1888. Before that date the company intimated to the respondent that they declined to renew the policy on any terms; whereupon he, being desirous to keep the insurance in his office, communicated with the son of the assured, who acted for his father in these matters, and, with his assent, opened an insurance with the Scottish Union and National Insurance Company. On behalf of that company he issued to Mr. King a document termed an interim receipt, and received in exchange

for it a year's premium of \$68.75. The receipt, which the respondent had admittedly power to issue, constituted an insurance for thirty days from the 8th July, subject to cancelment at any time within that period, upon written notice to the assured. On the 12th July he received a letter from the manager of the Scottish Company, instructing him to cancel, in reply to which he wrote a letter of remonstrance, urging that the risk was one which the company ought to have no hesitation in accepting. On the 13th July an answer from the manager, confirming previous instructions, reached his office, was there opened by Mr. Stanger, his chief clerk, and was then forwarded to and received by the respondent on the evening of the same day.

The respondent went to his office early on the morning of Saturday, the 14th July, when he directed Mr. Stanger to transfer the insurance from the Scottish to the appellant company, and was informed that, in accordance with usual practice, the transfer had already been made in his books. The respondent left early in the forenoon; and, after his departure, Mr. Stanger posted, about 2 p.m., a report to the appellants, informing them, *inter alia*, that an insurance of Mr. King's premises had been effected on their behalf. The office was then closed for the day, and immediately afterwards Mr. Stanger learned that there was a fire on the premises, but could not ascertain the amount of damage which had been done.

The respondent heard of the fire for the first time on the Sunday forenoon, from Mr. King, junior, whom he then informed that the insurance had been transferred from the Scottish to the appellant company. Mr. King, whose father still held the interim receipt of the Scottish Company, without notice of cancellation, states that he said in reply, "Well, I will expect you to see me out of the matter." According to the respondent's account, the answer he received was, "All right; do whatever you like with it." On the Monday, a written claim for the amount of his loss was preferred by Mr. King against the appellants, and the claim and an estimate of the loss was, on that day, sent to them by the respondent. On the same day the premium which had been received by the respondent was transferred, in his cash book, from the credit of the Scottish Company to that of the appellants. Charles D. Hanson, an insurance adjuster, was, with their assent, appointed to act on behalf of the appellants; and, after receiving his report, they, on the 1st August, 1888, paid the sum of \$2,872.32 to Mr. King.

The appellants filed a writ and declaration against the respondent in January, 1889, in which they alleged that he had been guilty of wilful deceit, and had fraudulently effected, or purported to effect, a transference of the insurance in his books after the fire had occurred, in the knowledge that the Scottish office, and not the appellants, were the only insurers at the time, with the fraudulent purpose of relieving himself of a possible claim at the instance of the Scottish Company in consequence of his neglect to give a written notice of cancellation, pursuant to their instructions. Upon that issue, the case went to trial before Mr. Justice Wurttele, who acquitted the respondent of all imputations of fraud, and dismissed the action with costs. (M. L. R., 5 S. C. 262.) The appellants then carried the case to the appeal side of the Court of Queen's Bench, where, admitting that the transfer had been made in the respondent's books before the fire occurred, they nevertheless insisted that the charge of fraud had been proved. The Court of Queen's Bench, consisting of five judges, unanimously affirmed the decision of Mr. Justice Wurttele, and dismissed the appeal with costs. (M. L. R., 7 Q. B. 323.)

Upon the argument of this appeal, the appellants maintained that the charges of fraud which they prefer are borne out by the evidence. It certainly appears to their Lordships that the conduct of the respondent, when subsequently called upon to explain the particulars of the transaction, was neither candid nor creditable, and was well calculated to excite suspicion; but, upon the facts proved, their Lordships are unable to differ from the conclusion at which all the learned judges below have arrived.

The appellants did not confine their argument to the issue which alone was raised before Mr. Justice Wurttele and the Court of Appeal. They argued at great length that their pleadings, taken in connection with the evidence adduced at the trial, disclose such negligence, or breach of duty, committed by the respondent acting in the capacity of their agent, as is in law sufficient to infer his liability to them for the sum claimed in this action. On the other hand, the respondent maintained that the new cause of action, brought forward here for the first time, was not within the appellants' declaration, that the evidence led at the trial was not directed to it, and that it ought not to be entertained by this Board.

Upon the merits of the new question, the argument of the respondent, shortly stated, was this: That he had authority from

Mr. King, junior, to transfer the risk from the Scottish Company to the appellants, and that notice to cancel the receipt of the Scottish Company was therefore unnecessary; that, according to the practice of insurance agents, a valid substitution was made by the entries of Saturday, 14th July, of the appellants for the Scottish Company as insurers of the premises; and that the practice was in conformity with the principles recognized in *Routh v. Thompson* (13 East, 274) and similar decisions. In any view, he maintained that his representations to the appellants, to the effect that they were the insurers at the time of the fire, were made by him in good faith, and in the reasonable belief that such was the fact, derived from the general understanding and course of dealing in that part of the world. He also maintained that Mr. Hanson, according to the custom of insurance offices there, was charged with the duty of inquiring into the legal liability of the appellants; and that the whole circumstances bearing upon that liability, as they appeared in the respondent's books, were fully disclosed to him.

Their Lordships are of opinion that, in the circumstances of this appeal, the appellants are not entitled to raise any issue except that of fraud. They do not question the accuracy of the general rule laid down by the Court of Exchequer in *Swinfen v. Lord Chelmsford* (5 H. & N. 890), to the effect that, when a declaration discloses a certain state of facts, the plaintiff may recover upon the liability which the facts disclose. One material difference between that case and the present consists in the fact that the point there raised had been put forward at the trial, so that the defendant had notice of it. *Thom v. Bigland* (8 Exchq. 725), the other authority upon which the appellants relied, in which the plaintiff was held to be precluded from raising any other issue than fraud in the Appeal Court, comes much nearer to the present case. Baron Parke observed (8 Exchq. 730), "If 'the words 'falsely' and fraudulently' can be struck out of a 'declaration so as to leave a good cause of action, that may be 'done.' In this case it is of the essence of the appellants' declaration that the respondent was guilty of fraud, and that is not proved. If the allegations of fraud and wilful misrepresentation were expunged, it is exceedingly doubtful whether there would remain an intelligible charge of negligence.

Their Lordships do not find it necessary to rest their decision upon that ground. When a question of law is raised for the first time in a Court of last resort, upon the construction of a

document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. To accept the proof adduced by a defendant in order to clear himself of a charge of fraud, as representing all the evidence which he could have brought forward in order to rebut a charge of negligence, might be attended with the risk of doing injustice.

In this case, there are various points upon which the evidence does not appear to their Lordships to be so full and satisfactory as it might and probably would have been, had the question of negligence been raised at the trial. The points touching the authority of the respondent to make a transfer of the risk on behalf of the assured, and the honesty of his belief in the validity of the transaction of which the appellants complain, depend, as was shown by their argument, upon the degree of credibility to be attached to different witnesses, a matter which ought to have been submitted to the Judge before whom they were examined. There are two other points upon which light might have been thrown, had the plea of negligence been taken before him, these being (1) the ordinary course of insurance business, and (2) the position and duties of an insurance adjuster. Were their Lordships to decide upon the evidence as it stands, and the arguments addressed to them, they could only be guided by their own knowledge of the course of insurance business in this country, which the evidence shows to be so far different from that followed in the city of Montreal, as to make it unsafe to assume that conduct which might tend to show negligence in the one case would do so in the other.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from and to dismiss the appeal, the costs of which must be borne by the appellants.

Judgment affirmed.

Bompas, Q. C., and Gore for appellants.

Fullarton, Q. C., and H. J. Kavanagh (of the Montreal Bar) for respondent.

PROCEEDINGS IN APPEAL.—MONTREAL.

Thursday, September 15, 1892.

Lacoste, C.J., Baby, Bossé, Blanchet, JJ.

Bernier & Choquette.—Motion for dismissal of appeal granted.

Déchêne & Cité de Montréal.—Motion for leave to appeal to Privy Council granted.

St. Lawrence Sugar Refining Co. & Ives.—Hearing concluded, on appeal from judgment of Superior Court, Montreal, Loranger, J., May 12, 1890.—C.A.V.

Johnson & Hope.—Settled out of Court.

Friday, September 16.

Baby, Bossé, Blanchet, Hall, JJ.

McLaughlin & Grenier.—Petition to quash inscription granted, and appeal dismissed.

Syndics de la paroisse du St. Sacrement & Stewart.—Appeal dismissed on motion, without costs.

Baby, Bossé, Blanchet, Hall, Tellier, JJ.

Starr & Leprohon.—Heard on appeal from judgment of Superior Court, Montreal, Tait J., Jan. 4, 1892.—C.A.V.

Lacoste, C.J., Baby, Bossé, Blanchet, Hall, JJ.

Collège des Médecins et Chirurgiens & Pavlides.—Heard on appeal from judgment of Superior Court, Montreal, deLorimier, J., Aug. 9, 1892.—C.A.V.

Baker & Société de Construction Métropolitaine.—Heard on appeal from judgment of Superior Court, Montreal, Gill, J., Nov. 3, 1890.—C.A.V.

Saturday, September 17.

Lacoste, C.J., Baby, Bossé, Blanchet, JJ.

Kearney & Vinette.—Motion for dismissal of appeal granted.

Lacoste, C.J., Baby, Bossé, Hall, Wurtele, JJ.

Canada Atlantic R. Co. & Norris.—Heard on appeal from judgment of Superior Court, Montreal, Taschereau, J., Sept. 6, 1890.—C.A.V.

Baby, Bossé, Blanchet, Hall, JJ.

Royal Canadian Ins. Co. & Roberge.—Appeal from judgment of Court of Review, Montreal, Jetté, Wurtele, Tait, JJ., April 30, 1891.—Part heard.

Monday, September 19.

Lacoste, C.J., Baby, Bossé, Blanchet, Wurtele, JJ.

Stock & Gazette Printing Co.—Respondent having desisted from judgment, appeal maintained.

Baby, Bossé, Blanchet, Wurtele, Tellier, JJ.

Fogarty & Fogarty.—Heard on appeal from judgment of Superior Court, Montreal, Gill, J., Nov. 3, 1890.—C.A.V.

Lacoste, C.J., Baby, Bossé, Blanchet, Wurtele, JJ.

Kay et vir & Gibeau.—Heard on appeal from judgment of Court of Review, Montreal, Gill, Loranger, Tait, JJ., April 30, 1890.—C.A.V.

Corporation Cité de Hull & Gagné.—Settled out of Court.

Baby, Bossé, Blanchet, Hall, JJ.

Royal Canadian Ins. Co. & Roberge.—Hearing continued.

Tuesday, September 20.

Baby, Bossé, Blanchet, Hall, JJ.

Royal Canadian Ins. Co. & Roberge.—Hearing concluded.—C.A.V.

Lacoste, C.J., Baby, Bossé, Blanchet, Hall, JJ.

Evans & Incumbent & Churchwardens of St. Stephen's Church.—Heard on appeal from judgment of Court of Review, Montreal, Mathieu, Wurtele, Pagnuelo, JJ., April 30, 1891.—C.A.V.

Baby, Bossé, Blanchet, Hall, Wurtele, JJ.

Legault dit Deslauriers & Boileau—Heard on appeal from judgment of Superior Court, Montreal, Pagnuelo, J., March 20, 1891.—C.A.V.

Cité de Montréal & Wilson.—Heard on appeal from judgment of Superior Court, Montreal, Jetté, J., Sept. 8, 1890.—C.A.V.

Baby, Bossé, Blanchet, Hall, JJ.

Auger & Cornellier.—Heard on appeal from judgment of Court of Review, Montreal, Taschereau, Wurtele, DeLorimier, JJ., May 30, 1891.—C.A.V.

Wednesday, September 21.

Lacoste, C.J., Baby, Bossé, Blanchet, Hall, JJ.

Bury & Murphy.—Heard on appeal from judgment of Superior Court, Montreal, Wurtele, J., Sept. 8, 1890.—C.A.V.

Lacoste, C.J., Bossé, Blanchet, Hall, Wurtele, JJ.

Wutf & Tiffin.—Heard on appeal from judgment of Superior Court, Montreal, Jetté, J., June 13, 1890.—C.A.V.

Thursday, September 22.

Lacoste, C.J., Baby, Bossé, Hall, Wurtele, JJ.

Hall & McCaffrey.—Appeal maintained, by consent in writing.

Lacoste, C.J., Baby, Bossé, Blanchet, Hall, JJ.

Molleur & Ville de St. Jean.—Heard on appeal from judgment of Superior Court, Iberville, Chagnon, J., Feb. 20, 1892.—C.A.V.

Lacoste, C.J., Baby, Bossé, Hall, Wurtele, JJ.

Samoisette & Brossard.—Appeal from judgment of Superior Court, Iberville, Tellier, J., June 27, 1892.—Part heard.

Friday, September 23.

Lacoste, C.J., Baby, Bossé, Hall, Wurtele, JJ.

Samoisette & Brossard.—Hearing concluded, C.A.V.

Doutre & Bourbonnais.—Heard on appeal from Superior Court, Beauharnois, Bélanger, J., April 7, 1891.—C.A.V.

Campbell & Riendeau.—Heard on appeal from judgment of Circuit Court, Terrebonne, May 16, 1891.—C.A.V.

Saturday, September 24.

Lacoste, C.J., Baby, Bossé, Blanchet, Hall, JJ.

Ross & Inglis.—Appeal from judgment of Superior Court, Terrebonne, Nov. 15, 1887. Submitted on factums.—C.A.V.

Baby, Bossé, Blanchet, Hall, Tellier, JJ.

Christin & Lacoste.—Heard on appeal from judgment of Superior Court, Montreal, Wurtele, J., May 29, 1890.—C.A.V.

Monday, September 26.

Baby, Bossé, Blanchet, Hall, Wurtele, JJ.

Piché & Letang.—Leave granted to appeal from judgment of Court of Review, Montreal, ordering a new trial.

Boivin & Demers.—Motion for dismissal of appeal granted.

Lacoste, C.J., Baby, Bossé, Hall, Wurtele, JJ.

Corporation de St. Mathias & Lussier.—Motion for dismissal of appeal granted.

Lacoste, C.J., Baby, Bossé, Blanchet, Hall, JJ. .

Phelan & McGoldrick.—Motion for dismissal of appeal rejected.

Lacoste, C.J., Bossé, Blanchet, Hall, Tait, JJ.

Lefebvre & Beaudin.—Appeal from judgment of S.C., Montreal, Wurtele, J., Jan. 16, 1889. Appeal maintained against Varin, curator, but dismissed as to the other parties.

Lacoste, C.J., Bossé, Blanchet, Hall, Wurtele, JJ.

Desjardins & Bruchesi.—Appeal from judgment of S. C., Montreal, maintaining answer in law. Reformed; demurrer maintained in part only.

Baby, Bossé, Blanchet, Hall, Wurtele, JJ.

Ouimet & Benoit.—Appeal from judgment of S. C., Montreal, Loranger, J., Feb. 27, 1891. Confirmed.

Burland & G. T. R. Co.—Appeal from judgment of S. C., Iberville, Charland, J., Feb. 15, 1890. Confirmed.

Chevalier & Banque du Peuple.—Appeal from judgment of S. C., Iberville, Charland, J., March 17, 1890. Confirmed.

Fernet & Charron dit Ducharme.—Appeal from judgment of S. C., Richelieu, Ouimet, J., May 2, 1890. Confirmed.

Tourville & McDonald.—Appeal from judgment of S. C., Richelieu, Papineau, J., May 10, 1887. Confirmed.

Lacoste, C.J., Baby, Bossé, Blanchet, Hall, JJ.

Wood & Maloney.—Appeal from judgment of S. C., Montreal, Wurtele, J., Oct. 28, 1890. Confirmed.

McDonald & Ferdais.—Appeal from judgment of S. C., Iberville, Wurtele, J., Sept. 28, 1889. Confirmed.

Pearson & Spooner.—Appeal from judgment of Court of Review, Montreal, Dec. 30, 1890 (M. L. R., 7 S. C. 315). Confirmed.

Cie. de Navigation R. & O. & Trigranne.—Appeal from judgment of S. C., Richelieu, Ouimet, J., April 2, 1889. Confirmed.

Hetu & Menard.—Appeal from judgment of S. C., Montreal, DeLorimier, J., Nov. 23, 1889. Confirmed.

College des Medecins et Chirurgiens & Pavlides.—Appeal from judgment of S. C., Montreal, deLorimier, J., Aug. 9, 1892. Reversed.

Lacoste, C.J., Baby, Bossé, Blanchet, Wurtele, JJ.

Mills & Limoges.—Heard on appeal from judgment of Superior Court, Montreal, deLorimier, J., April 13, 1891.—C.A.V.

Tuesday, September 27.

Lacoste, C.J., Baby, Blanchet, Hall, Wurtele, JJ.

Appeals declared abandoned for default to proceed ;—Robillard & Institut Canadien ; C. P. R. Co. & Dufresne, Brand & Farrell ; Berthiaume & New England Paper Co.

Guarantee Co. of N. A. & Harbour Commissioners of Montreal.—Heard on appeal from judgment of Superior Court, Montreal, Malhiot, J., Feb. 15, 1890.—C.A.V.

Reid & McFarlane.—Heard on appeal from judgment of Superior Court, Montreal, Loranger, J., Nov. 18, 1889.—C.A.V.

Montreal Watch Case Co. & Bonneau.—Heard on appeal from judgment of Superior Court, Montreal, Loranger, J., May 20, 1890.—C.A.V.

The Court adjourned to Nov. 15.

Délibérés after September Term.

Atlantic & N. W. Co. & Turcotte ; St. Lawrence Sugar Refining Co. and Ives ; Starr & Leprohon ; Baker & Société de Construction ; Canada Atlantic R. Co. & Norris ; Fogarty & Fogarty ; Kay & Gibeau ; Royal Canadian Ins. Co. & Roberge ; Evans & St. Stephen's Church ; Legault dit Deslauriers & Boileau ; City of Montreal & Wilson ; Auger & Cornellier ; Bury & Murphy ; Wulff & Tiffin ; Molleur & Ville de St. Jean ; Samoisette & Brossard ; Dautre & Bourbonnais ; Campbell & Riendeau ; Ross & Inglis ; Christin & Lacoste ; Mills & Limoges ; Guarantee Co. of N. A. & Harbour Commissioners : Reid & McFarlane ; Montreal Watch Case Co. & Bonneau.

INSOLVENT NOTICES.

Quebec Official Gazette, Sept. 17 & 24, and Oct. 1.

Judicial Abandonments.

BEAUDET, Lefavre & Garneau, Quebec, Sept. 8.

BOISSEAU & Béland, Quebec, Sept. 9.

CHAPLELAINE, J. Agénor, Sorel, Sept. 24.

CHARETTE, Thomas, Gatineau Point, Sept. 15.

DEGAGNÉ, J. Eloï, Eboulements, Sept. 17.

FORTIN & Cie., D. (Marie Dorille Fortin), St. Prime, Sept. 23.

VANDRY & Turcotte, Quebec, Sept. 13.

Curators Appointed.

- ALAIN, J. E., Quebec.—N. Matte, Quebec, curator, Sept. 6.
- BEAUDET, Lefaiivre & Gagnon.—H. A. Bedard, Quebec, curator, Sept. 23.
- BERNIER, A. H., Isle Verte.—H. A. Bedard, Quebec, curator, Sept. 19.
- BOISSEAU & Béland, Quebec.—N. Matte, Quebec, curator, Sept. 26.
- BORCHARD, O., Quebec.—G. Darveau, Quebec, curator, Sept. 15.
- GAUTHIER, Jean, St. Jérôme.—H. A. Bedard, Quebec, curator, Sept. 12.
- GUIMONT & Cie., St. Raymond.—H. A. Bédard, Quebec, curator, Sept. 17.
- JOLIVET, Auguste.—Michel Viger, Longueuil, curator, Aug. 50.
- MARTEL, Honoré, Chicoutimi.—H. A. Bedard, Quebec, curator, Sept. 21.
- MEYER, Maurice.—J. M. Marcotte, Montreal, curator, Sept. 21.
- MORIN, Geo., St. François-Xavier de Brompton.—Royer & Burrage, Sherbrooke, joint curator, Sept. 26.
- VANDRY & Turcotte, Quebec.—H. A. Bedard, Quebec, curator, Sept. 24.
- VILLENEUVE, Thomas, St. Fulgence.—H. A. Bedard, Quebec, curator, Sept. 12.

Dividends.

- BAPTIST, Son & Co., George.—Dividend, payable Oct. 4, Macintosh & Hyde, Montreal, joint curator.
- BÉLANGER, Geo., Sherbrooke.—First and final dividend, payable Oct. 4, Royer & Burrage, Sherbrooke, joint curator.
- COMPAGNIE d'Imprimerie et de Publication du Canada.—Dividend, payable Oct. 11, J. B. Young, Montreal, liquidator.
- COSSETTE & Co. (Dame Eléonore Bailly).—Dividend on proceeds of immovables, payable Oct. 12, C. Desmarteau, Montreal, curator.
- DÉCHÈNE & Co., F. M.—New dividend declared, payable Oct. 3, G. H. Burroughs, Quebec, curator.
- DESROCHERS, F. X.—First and final dividend, payable Oct. 15, A. Gaumond, St. Jean Deschailons, curator.
- DUBOIS, Louis, tailor, St. Johns.—Dividend, payable Oct. 11, D. Seath, Montreal, curator.
- DUPONT, Nap., Montreal.—First and final dividend, payable Oct. 12, C. Desmarteau, Montreal, curator.

HARKIN & Co., B. (Catherine Cleary), Montreal.—First and final dividend, payable Oct. 13, C. Desmarteau, Montreal, curator.

HERALD Company (Limited).—Second and final dividend, payable Oct. 4, W. H. Whyte, Montreal, liquidator.

LACAS & Co., E.—First and final dividend, payable Sept. 29, J. M. Marcotte, Montreal, curator.

LAVALLEE, E. N., St. Philippe de Néri.—First and final dividend, payable Oct. 4, H. A. Bédard, Quebec, curator.

LEVI, Raphaël, St. Johns.—First dividend, payable Oct. 3, F. W. Radford, Montreal, curator.

ROBINSON, J. Theo., Montreal.—First and final dividend, payable Oct. 4, J. McD. Hains, Montreal, curator.

ROUSSEAU, Samuel, Hochelaga.—Dividend, payable Oct. 1, L. G. G. Beliveau, Montreal, curator.

SAMSON, Thomas J., Victoriaville.—First dividend, payable Oct. 8, A. Quesnel, Arthabaskaville, curator.

TURGEON & Corriveau, Quebec.—First and final dividend, payable Oct. 4, H. A. Bedard, Quebec, curator.

WHITE & Co., J. D. (Archibald J. Grant), Montreal.—First dividend, payable Oct. 18, Kent & Turcotte, Montreal, joint curator.

AN INGENIOUS USE OF ELECTRICITY.—For some time Mr. Triquet, a cigar merchant, of Toledo, Ohio, missed cigars from the show-case in his office, and although the premises were watched by detectives for several days, nothing unusual was observed. As a last resort, he applied to an inventor of a flash-light photograph apparatus worked by electricity. The apparatus was placed in the office and left to itself. A few days later it was found to contain a flash photograph showing two boys opening the glass case. The picture led to their apprehension by the police and subsequent committal to prison. The apparatus consists of a camera placed in a box, which is closed by a shutter operated by a spring and escapement released by an electro-magnet. The necessary flash-light is got by means of a match which presses against a rough disc. An electro-magnet on the top of the camera box, when excited by a current, releases a detent, and allows the rough disc to strike a light with the match and ignite the flashing powder. All this occurs in a fraction of a second, and the shutter closes on the camera, retaining the photograph. The current is supplied by a battery, and is started in the circuit by an arrangement of contacts which are unconsciously closed by the thief. Thus the boys, in opening the glass case unawares, completed the electric circuit, which immediately exposed the camera and kindled the flash-light, much to their amazement.

THE LEGAL NEWS.

VOL. XV.

NOVEMBER 1, 1892.

No. 21.

CURRENT TOPICS.

The retirement of Mr. Justice Cross from the Court of Queen's Bench, and the appointment of Mr. Justice Wurtele in his place, is the last of the changes which complete the re-constitution of the tribunal. Of the five judges who composed the Court in 1881, four—Chief Justice Dorion and Justices Monk, Ramsay and Tessier—are dead, and the fifth, Mr. Justice Cross, has retired after fifteen years' service. Mr. Justice Baby who, in 1881, was appointed to the newly created sixth judgeship of the Court, is now the senior member. Mr. Justice Cross came to the bench with a ripe experience, and his opinions, during the last fifteen years, have always been received with respect by his colleagues and by the profession generally. In commercial matters, very frequently, the delivery of the judgment of the Court was entrusted to him, and many of these opinions, as they appear in the pages of the Montreal Law Reports, will long be cited as leading cases in the law of which they treat. As a whole, his opinions were well sustained by the Courts of final appeal. The appointment of Mr. Justice Wurtele, who, for more than a year past, has been acting as assistant judge, is a natural transition, and has proved satisfactory to the profession and the public.

We have also to note an important change on the Eng-

lish bench. Mr. Justice Denman, the senior puisne judge of England, has retired after twenty years' service, and Mr. William Rann Kennedy has been appointed to fill the vacancy. Mr. Justice Denman was a fine scholar, having been senior classic of his year at Cambridge. Not long ago he published a translation of Milton's *Comus* into Greek and Arabic. He has been very popular as a judge. In another issue we shall give a short account of the proceedings at his retirement. His successor was also senior classic at Cambridge, in 1868. He is still comparatively a young man, having been born in 1846.

A year ago, the fear was expressed that the inadequacy of the remuneration allotted to our judges, would deprive the Province of the services of the person universally admitted to be best qualified for the important position then vacant. In England the remuneration of the superior judges is very much higher, yet, as shown by the extract appended, from a London letter, the salaries are far from being attractive to the foremost men:—

“There remains something further to be said. It is that our judges nowadays are no longer selected from the acknowledged leaders of the bar: they come from the second and not from the front rank. Our greatest advocates could not be prevailed upon to accept ordinary judgeships, for much of the old time dignity of the judicial office has disappeared in like manner as that of the bishops. There is therefore nothing to compensate the brilliant advocate with a fee book of twice, or it may be three times, the value of the £5,000 salary of the judge, with the popularity which advocacy brings, and with a seat in Parliament, for the pecuniary and personal advantages he relinquishes in accepting a seat upon the bench. Hence it comes that there is a most brilliant circle of eminent advocates whose names are household words with the public, but who, to the perplexity of the laity, as we know from comments in the newspapers, are apparently passed over and left to end their days at the bar instead of on the bench, which outsiders in their simplicity suppose to be the object of every barrister's ambition. In the profession it is well known that the very opposite of this is the case. There could not be a more

evident proof of it than the report circulated some time ago and really believed, that Mr. Justice Hawkins, one of the most brilliant of that circle of advocates which included Coleridge, Sergeant Ballantine, Serjeant Parry, Holker and Huddleston, and who was perhaps the most noted cross-examiner of them all before he had given the *coup de grace* to Arthur Orton masquerading as Sir Roger Doughty Tichborne, was, after fifteen years of service at the bench, to descend into the arena once more and win fresh laurels ere he went into retirement. This, to be sure, would hardly have been supposed of any judge other than the unconventional 'Arry 'Awkins, whose *diablerie* is the delight of the bar; nor would it of him, perhaps, but for the fact that what the latest Savoy comic opera terms the 'Propriety, prism and prunes' element has of recent years become much less observable and much less insisted upon. The judges themselves are getting a little ashamed of the gorgeous array which, no doubt suitable enough in the days of gold-laced coats, knee breeches, silk stockings and perukes, now seems antiquated and somewhat ridiculous. Such trappings somehow do not suit the modern physiognomy. When etiquette allows, the judges prefer to don the plain black silk gown, and they no doubt feel, as they certainly look, more comfortable and more like other human beings, their contemporaries. The ceremonial of the assizes, the trumpeting and processions, the banquetings, the state visit to the cathedral services, the assize sermons and the rest, have lost their former gravity and significance, and have now too much of the theatrical and unreal for serious business men who only desire to do the work of the country without making a fuss and keeping up a show of state as the Sovereign's representatives, which the Sovereign herself has taught us to forget. One of the stories told of Mr. Justice Hawkins lately is that on a recent occasion he arrived at an assize town dressed in a suit of light tweeds, himself at one end of a string and his well-known fox terrier at the other. Waiting to receive him was a deputation of civic authorities in the cocked hats and gold chains which delight such dignitaries. The light tweeds were hardly in keeping with this ornateness; but worse than all was the behavior of the terrier who, with truly canine disregard of the proprieties, occupied the anxious attention of the judge, his master, with certain observances which he could not be persuaded by any means to forego."

NEW PUBLICATION.

MEDICAL JURISPRUDENCE AND TOXICOLOGY, by Henry C. Chapman, M.D.—Publisher, W. B. Saunders, Philadelphia.

This manual, comprised within 229 pages, contains the substance of a course of lectures on Medical Jurisprudence, delivered by the author to the students of Jefferson Medical College during the last session. It is written in a clear style, free from technicalities, and treats of a number of subjects with which it is important that lawyers practising before criminal courts should be familiar. Physicians are often expected to speak positively when examined in criminal cases, but the reader will note that appearances are so deceptive that great caution is necessary in testifying as to cause of death, signs of pregnancy, indications of an abortion having been committed, and the like. Even sex is sometimes doubtful, and the decision may with advantage be postponed until the child arrives at the age of puberty. The forms of insanity are lucidly and briefly treated. The manual concludes with a chapter on toxicology, indicating the symptoms of administration of poisons. (Price, \$1.25.)

COURT OF REVIEW.

MONTREAL, December 30, 1891.

Coram Sir F. G. JOHNSON, C.J., MATHIEU, LORANGER, JJ.

NORTHFIELD v. LAWRENCE.

Promissory note—Endorsement—Revision of ruling at enquête.

HELD:—*That a ruling of the judge at enquête, rejecting evidence, may be reversed by the Court at the final hearing, and the case may be sent back for the adduction of such evidence.*

Per JOHNSON, C.J.:—*Parol evidence is admissible to establish the real relationship of the parties to a bill or note, and the circumstances under which it was endorsed.*

INSCRIPTION IN REVIEW of a judgment of the Superior Court, Montreal, Davidson, J., May 14, 1891.

Judgment was rendered March 26, 1891, by Wurtele, J., revising the ruling of Jetté, J., at *enquête*, rejecting evidence, and sending the case back for the adduction of the evidence which had been excluded. See M. L. R., 7 S. C. 148, where the judgment of Wurtele, J., is reported.

The action was dismissed by the final judgment, rendered by Davidson, J., May 14, 1891, as follows :—

"Seeing plaintiff alleges that by private writing dated 22nd October, 1889, he sold to Moss Edward Frank Lawrance, all his interest in the business of Northfield & Co., which firm was composed of himself and said Lawrance, and with right to continue the firm's name, that the consideration was \$360, whereof \$60 was payable in cash and the balance by 30 notes of \$10 each, payable weekly, dated 22nd October, 1889, signed by Northfield & Co., and payable to plaintiff's order, that defendant signed each of said notes as *donneur d'aval* under his firm name of 'B. Lawrance & Co.'; that plaintiff has only received on account of said notes \$59.10, leaving a balance due of \$240.90, that plaintiff never endorsed the notes which are lost, but plaintiff offers security; wherefore plaintiff prays judgment for \$240.90, and *acte* of his offer of security;

"Seeing defendant pleads that plaintiff had accepted said promissory notes in said settlement before they were endorsed; that the defendant only endorsed them for plaintiff's accommodation, to enable him to discount them; that in any event their amount would be compensated by \$1,252.01 due by plaintiff to defendant, for four promissory notes signed by plaintiff, dated 21st August, 1889, for \$183 each, and for another like note dated 27th August, for \$200, and for \$319.75 for goods sold to Northfield & Co., while the firm was composed of plaintiff and said Moss E. F. Lawrance;

"Considering that, by the sale and assignment by plaintiff to Moss E. F. Lawrance, the balance of consideration remaining due was set forth as follows: 'And the balance or remaining sum of \$300 hath been paid by said party of the second part to said party of the first part, by 30 promissory notes of \$10 each, payable weekly, the receipt whereof the said party of first part hereby acknowledges,' and that in said statement of consideration no mention is made of any security, or endorsement by way of security, of said promissory notes;

"Considering it is proved that the defendant only endorsed said notes after they had been delivered to plaintiff, in furtherance and completion of said sale and transfer, and that said endorsement was only for plaintiff's accommodation, and to enable him to obtain discount of said notes;

"Considering plaintiff has created a strong presumption against his present pretension, by the fact that although the greater number of said notes were being dishonored, from week to week,

plaintiff never gave any notice to, or made any demand on defendant, until the present action dated 11th August, 1890 ;

“ Considering plaintiff hath failed to prove the material allegations of his declaration, and that defendant has proved the material allegations of his plea, to wit, that his endorsement was for accommodation ;

“ Maintaining said plea, doth dismiss plaintiff’s action.”

JOHNSON, Ch. J. (in Review) :—

The plaintiff alleged that on the 22nd of October, 1889, he had sold to Moss Edward Frank Lawrance, all his interest in the business of Northfield & Co., composed of both of them, with the right to continue the use of the firm’s name ; and that the consideration was \$360, whereof \$60 was payable in cash and the balance by thirty notes of \$10 each, payable weekly—dated 22nd October, 1889, and signed by Northfield & Co., payable to plaintiff’s order. That the defendant signed each of the notes as *donneur d’aval*, under his firm name of B. Lawrance & Co. He then alleged a payment of \$59.10, leaving a balance of \$240.90.

The defendant pleaded that the notes were accepted by the plaintiff before they were endorsed ; and that he only endorsed them for plaintiff’s accommodation, to enable him to discount them. He also pleaded compensation.

The main question is whether the defendant endorsed as guarantor, or for the plaintiff’s accommodation. Upon the evidence the Court below found for the defendant ; and that finding I see no reason, and have heard no reason given for disturbing. But objection was made to parol evidence to prove the circumstances in which the notes were endorsed ; and that objection was at first maintained, but afterwards over-ruled at the hearing on the merits, and the case was sent down for evidence, and was finally heard last May before Mr. Justice Davidson, who dismissed the plaintiff’s action. There can be no question that that judgment is in accordance with the proof, and the only points would be, first, the power of the judge to revise at the final hearing a ruling at *enquête* rejecting evidence, and, secondly, the correctness of the over-ruling. I entertain no doubt upon either of those points. The power is plainly given, or rather acknowledged, by the 2326th article of the Revised Statutes of Quebec, and I have never before seen it doubted. Then, as to the law that is to regulate the evidence in this case, it is, of course, the law of England in virtue of Art. 2341 of the Civil Code ; and

by that law parol evidence is admissible to show the real relationship of the parties to notes, and bills of exchange.

MATHIEU and LORANGER, JJ., concurred in the confirmation of the judgment, but considered that as the defendant had proved his plea of compensation, the judgment dismissing the action should rest on that ground.

Judgment:

"Considérant que le défendeur a prouvé son plaidoyer de compensation ;

"Considérant qu'il n'y a pas d'erreur dans le dispositif du dit jugement du 14 mai 1891, sans en adopter les motifs, le confirme, avec dépens."

Judgment confirmed.

Taillon, Bonin & Dufault for plaintiff.

J. P. Cooke for defendant.

COURT OF REVIEW.

MONTREAL, November 30, 1891.

Coram Sir F. G. JOHNSON, C.J., GILL and LORANGER, JJ.

FYFE v. BOYCE.

Promissory Note—Aval—Notice of Protest—Retroactive effect.

HELD:—That before the passing of the 53 Vict. (D) ch. 33, the holder of a promissory note was not bound to give notice of protest to the endorser pour aval, in order to hold him ; and that, as regards notes made before the passing of the said statute, it has no retroactive effect, and has not affected the position of the parties.

INSCRIPTION IN REVIEW of a judgment of the Superior Court, Montreal (MATHIEU, J.), May 14, 1891, which reads as follows:—

"Considérant qu'avant la passation du statut, 53 Vict. ch. 33, le porteur d'un billet promissoire n'était pas tenu de donner un avis de protêt au donneur d'aval, pour conserver son recours contre lui (Art. 2311, C.C.) ;

"Considérant que les billets, qui font la base de la présente action, ont été signés par le défendeur comme aval, avant la passation du dit statut ;

"Considérant que le dit demandeur a dû compter sur l'obligation du défendeur, comme aval, lorsqu'il accepta ces billets pro-

missoires, sans être tenu, en aucune manière, de lui donner un avis de protêt ;

“ Considérant que la loi nouvelle ne doit pas être appliquée, si cette obligation détruit ou change des effets sur lesquels des particuliers ont dû fermement compter ;

“ Considérant que lorsque le contrat, d’après la loi en vigueur à l’époque où il a lieu, est valable, le lien de droit, dès ce moment, se forme, et qu’il y a droit acquis pour les parties d’en réclamer l’exécution, et que la loi nouvelle ne peut rien changer à cette situation ;

“ Considérant que lorsque la loi ne retroagit pas expressément, comme dans le cas actuel, le juge ne peut jamais appliquer la loi, de manière à enlever à un particulier un droit qui est dans son domaine ;

“ Considérant que les parties à ces billets, le défendeur et le porteur, n’ont pas pu avoir la volonté de se soumettre à des obligations qu’aucune loi n’attachait à leur convention, lorsqu’elles l’ont faite, obligations qu’elles ne pouvaient pas prévoir, et auxquelles, peut-être, elles n’auraient pas du tout voulu consentir ;

“ Considérant que la loi nouvelle ne peut modifier aucun des effets d’un contrat, ni les augmenter, puisqu’elle aggraverait les obligations du débiteur, ni les diminuer, puisqu’elle attenterait aux droits du créancier ;

“ Considérant qu’il est essentiel de ne pas confondre le fond avec la forme, et que, si sous le droit antérieur au dit statut, le porteur d’un billet promissoire eût été tenu de donner avis de protêt au donneur d’aval, la loi nouvelle réglerait la forme du protêt et de l’avis de protêt que le créancier devrait donner ; mais que lorsque, comme dans le cas actuel, le porteur n’était pas tenu de donner un avis de protêt au donneur d’aval, la loi nouvelle n’a pas d’application, vu qu’elle ne règle pas seulement la forme, mais impose une obligation nouvelle qui n’existait pas dans la loi antérieure ;

“ Considérant que l’article 56 du chapitre 33 des statuts du Canada de 1890, 53 Victoria, qui dit que celui qui signe une lettre de change, autrement que comme tireur ou accepteur, est soumis à toutes les obligations d’un endosseur, vis-à-vis d’un détenteur régulier, et est sujet à toutes les dispositions du présent acte relatif aux endosseurs, et qui est rendu applicable aux billets promissoires par l’article 88 du même statut, n’a pas d’effet rétroactif, et ne s’applique pas aux billets promissoires dont il est question en cette cause ;

"Considérant que l'article 95 du dit statut décrète que les dispositions des articles 2279 à 2354, tous inclusivement, du Code Civil du Bas-Canada, sont abrogés à compter de l'entrée en vigueur du dit acte, mais que, toutefois, cette abrogation n'affectera rien de ce qui a été fait ou toléré, ni aucun droit, titre ou intérêt acquis ou dévolu avant l'entrée en vigueur du dit acte, non plus qu'aucun recours au sujet de la chose faite, ou de ce droit, titre ou intérêt;

"Considérant que la dite défense en droit est mal fondée;

"A renvoyé et renvoie la dite défense en droit avec dépens."

JOHNSON, Ch. J. (in Review):—

The point raised by demurrer to the plaintiff's declaration in this case, was whether, before the passing of the late statute (53 Vic. c. 33), the holder of a promissory note was bound to give notice to an endorser *pour aval*, in order to hold him. I put the case in this plain way, because the consequence of holding that the notice was required would entail an absolute and violent injustice upon the holder, if the law under which he contracted required none. It is plain that the old law under which this warranty was given, and the holder's right was acquired, did not necessitate notice. The subsequent statute, which had no effect at that time, has acquired no retroactive authority, and has not altered the position of the parties.

This was the holding of the Court below, and it is confirmed here, with costs to the party inscribing.

Judgment confirmed.

Curran & Grenier for plaintiff.

Girouard & de Lorimier for defendant.

THE QUEEN v. NEILL.

In this remarkable trial, which has ended, and rightly ended, in the conviction of the prisoner, a number of interesting legal and medico-legal points were raised.

1. *The admissibility of dying declarations.*—The girl Matilda Clover, for whose murder Neill is now awaiting execution, was seized with convulsions about 3 o'clock in the morning of October 21, 1891, and died about six hours later. During the intervals between the attacks she was conscious and rational, and in one of those lucid periods she said, 'I think I am going to die,' and asked to see her child. She also made a statement implicating

the prisoner. Was that statement admissible in evidence as a dying declaration? Mr. Justice Hawkins held, with perfect accuracy (if we may respectfully say so) upon the facts before him, that there was an absence of that instant conviction of the approach of death which the authorities—too well known to need recapitulation—require as a condition precedent to the reception of a dying declaration in evidence. We venture to submit, however, that the Attorney-General might, if he had been so minded, have made this evidence admissible. Persons who are suffering from the effects of strychnia have a strong apprehension of death, and if this had been established by the evidence of Dr. Stevenson as a scientific fact, it is difficult to see how the dying declaration of Matilda Clover could have been excluded.

2. *The Investigation of Collateral Charges.*—Neill was tried for the murder of Matilda Clover alone. If he had been, however, acquitted on this count of the indictment, he would still have had to stand his trial for the murders of the women Marsh and Shrivell, for the attempt to murder Louisa Harvey, and for the attempts he made to levy blackmail from Dr. Broadbent and Dr. Harper. Was the prosecution entitled to give evidence in support of these collateral charges on the trial of the prisoner for the murder of Clover? As to the blackmailing letters, there was of course no difficulty. These constituted most important evidence of motive; they were also part of the *res gestæ* in the *Clover Case*; and they were, therefore, clearly admissible. On this point, indeed, there was no dispute. But the proposed investigation of the '*Lou. Harvey*' and *Marsh and Shrivell Cases* raised a serious difficulty. Proof of these charges could not fail to prejudice the prisoner's case, and a jury could not well be expected to consider them as 'corroborative' evidence alone. On the other hand, the facts that Neill himself had undoubtedly linked all these cases together in his infamous efforts to levy blackmail, and that they went to prove motive, possession of strychnia by the prisoner, and a course of conduct, did seem to bring them within the *ratio decidendi* of the cases referred to at the trial. It is desirable, however, that there should be a definite ruling on this branch of the law of evidence by an appellate tribunal, and we trust that in some subsequent case, which is less clear than Neill's and less deserving of immediate punishment, it will be brought before the Court for Crown Cases Reserved or the promised Court of Criminal Appeal.

3. To our *knowledge of strychnia* the case of *Regina v. Neill* has added little. The following points are worthy of notice. (a) An interval of six hours elapsed between the commencement and the fatal termination of Clover's illness. This protracted duration was accounted for by the facts that a very large dose of strychnia was not given in the first instance, and that the murdered woman vomited copiously and repeatedly. No sedative, such as bromide of potassium, morphia, or chloroform, was, however, administered to her, and the case is, therefore, not on all-fours with that of Silas Barlow, to which Dr. Stevenson referred in the course of his evidence. (b) *Opisthotonos*—(that arching of the body which was such a marked feature in the Palmer and Dove cases)—was absent. Apparently, however, Clover had died in one of the intervals between the attacks of convulsions.

4. The *general reflections* which the Lambeth Poisoning case suggests are these: (a) The prosecution was conducted by Sir Charles Russell with singular ability and moderation, and the only point to which the most captious criticism could take exception was the manner in which the servant Lucy Rose was led' as to the symptoms of poisoning by strychnine. (b) Mr. Geoghegan's defence of the prisoner deserves all that Mr. Justice Hawkins said about it. But he was obliged (by the logic of his position) to 'approve and reprobate' on a somewhat extended scale. His cross-examination and part of his address were directed to show that the convulsions of delirium tremens, and not strychnia, might have been the cause of Clover's death. He then argued that Neill might have heard the symptoms, with which Clover died, described, and might, as a medical man, have attributed them to strychnia—an argument which came dangerously near an admission that Clover's symptoms were those of strychnine poisoning. He was also compelled to rely on Dr. Stevenson's skill in the Donworth case, while impeaching it in that of Clover. Mr. Serjeant Shee was placed in the same fatal difficulties in defending Palmer. (c) Of Mr. Justice Hawkins' charge to the jury, it would be presumptuous to say anything more than that it was worthy of his lordship's reputation as a scientific analyst of evidence. (d) On the belated plea of insanity, with which we are now threatened, we shall have something to say, if it is seriously put forward.—*Law Journal* (London).

SHOOTING SEDUCERS.

There have recently been two instances of a husband's shooting his wife's seducer in cold blood, which from their world-wide notoriety and the manner they have been commented upon in many quarters threaten to give civilization even a greater set back than that administered by the Louisiana massacre last March. Certainly the active spirits in the order of Mafia were as unfit to live as the victims of these private lynchings, yet there has been little justification of the act of the Louisiana lynchers outside of that state, while probably hundreds of people all over the world either secretly or avowedly approve of the acts of the injured husbands. On a question of this kind public sentiment is everything, and the letter of the law next to nothing. We believe that these episodes will exert a very appreciable influence towards barbarizing the popular conscience unless vigorous protest is made against a great deal of sentimental cant that has been uttered. Certainly members of our profession should feel a special responsibility in endeavoring to uphold a reign of law. It would be a waste of energy to argue elaborately concerning the right of a husband to kill his wife's paramour. Viewed as punishment for the crime, it could only be justified on the Draconian theory that death is the proper penalty for offences of all grades. We venture to say that in no Northern state of the Union could a bill be passed to-day making rape a capital crime. Yet rape is a more heinous offence than adultery. Considered as punishment, the assassination of a seducer is also open to the objection of punishing only one of two equally guilty parties. The last item of news about one of these recent tragedies was something which, in spite of the serious circumstances, appeals to the sense of humor. The husband, after his exoneration from criminal liability by a tribunal at the place where the shooting occurred, telegraphs to the father of the wife that his daughter is "vindicated." An adulteress vindicated by the escape of a murderer! Yet one sometimes hears men who ought to know better contend that society should condone the husband's revenge (nobody can make it out to be anything but brute revenge, and Othello's form of vengeance was more logical), for the sake of making adultery a dangerous crime to commit. We do not believe domestic sanctity could ever be in the slightest degree guarded through this iniquitous and clumsy expedient. So far from making men law-abiding, it would only tend toward making

women irresponsible. To tacitly concede to the husband the right of assassination would be a distinct step toward anarchy, besides opening an immense danger, as the exercise of lynch law always does, of sacrifice of the falsely accused. We think this a proper time for all leaders of popular opinion to say a few plain words on a disagreeable topic, because by reason of public lynchings and private assassinations citizens of the American Commonwealth are earning a bad name.—*New York Law Journal*.

THE CANADIAN CRIMINAL CODE.

The *Irish Times* calls attention to what it describes as "the progress of legal reform in the Dominion of Canada" in arriving at a criminal code "utterly freed from technicalities, obscurities, and other defects which experience has disclosed"—the work of Irishmen. The Canadians are the first of English-speaking peoples to enact and possess such a code. The ground was prepared for it by the most vigorous and constant effort, and for many years in this task, Judge, now Senator Gowan, of Canada, a distinguished Wexford man, was the most conspicuous and laborious worker. It was by his wisdom and effort that the revisions and consolidations were effected which were preliminary processes, and not only asserted the principle, but shaped the course of reform. At last the accomplished minister of justice of Canada, Sir John Thompson, had the courage to introduce the code, and the tact and ability to secure its passing through Parliament. This able man is also, if not an Irishman by birth, the son of a county Waterford man who some fifty years ago emigrated to Nova Scotia. Sir John Thompson is a ready and powerful debater, and the speeches which he delivered in pressing his measure upon the attention of the Canadian Commons were marked by the highest genius, and a lucidness which made every feature of his statement absolutely clear and convincing. Sir John Thompson explained that his bill was founded on the draft code prepared by the Royal Commission in Great Britain in 1880: "The efforts at the reduction of the criminal law of England into this shape have been carried on for nearly sixty years, and although not yet perfected by statute those efforts have given us immense help in simplifying and reducing into a system of this kind our law relating to criminal matters and relating to criminal procedure."

The bill dealt with offences against public order, internal and

external; offences affecting the administration of the law and of justice; offences against religion, morals and public convenience; offences against the person and reputation; offences against the rights of property and rights arising out of contracts; and offences connected with trade, with procedure and proceedings after conviction; and actions against persons administering the criminal law. "The bill (he added) aimed at a codification of common and statutory law. It did not aim at completely superseding the common law, while it did aim at completely superseding the statutory law relating to crimes. The common law would still exist and be referred to, and in that respect the code, if it should be adopted, would have the elasticity which has been so much desired by those who are opposed to codification on general principles. But it will not provide for the punishment of anything which has been hitherto a statutory offence unless that offence is prescribed by the terms of the enactment itself. It proposes to abolish the distinction between principals and accessories. It aims at making punishments for various offences of something like the same grade more uniform. It discontinues the use of the word 'malice,' and the word 'maliciously,' which are so common in both statutory and common law, and which have been found to lead to considerable uncertainty and ambiguity, administered as enactments with regard to crime always are, by juries. It deals with the offence of bigamy, principally for the purpose of removing the doubts which exist now as to the actual state of the law with regard to the period during which belief of the decease of the other party to the original marriage may be an exoneration. We treat the place of trial, he continued, as a matter of convenience, and the accused may be tried where he has been arrested, or where he may be in custody. It abolishes writs of error and provides an appeal court, which is practically the same as the old Court of Crown Cases Reserved, with larger power than at present. It provides for new trials in certain criminal cases, and contains a new provision that in certain cases and on certain representations a new trial may be ordered at the instance of the Crown, represented by the minister of justice for the time being."

WHO IS THE OLDEST LIVING EDITOR?—General Mason Brayman, formerly of Illinois, now of Kansas City, commenced to edit the *Buffalo Bulletin*, February 4, 1834. Who hereabouts, asks the *Chicago Legal News*, antedates him? He was admitted to the Illinois Bar, March 8, 1842, was the editor of the Illinois Revised Statutes of 1845, one of the early attorneys of the Illinois Central Railroad, general in the army under General Grant, editor of the *State Journal* at Springfield and governor of Idaho.

*INSOLVENT NOTICES.**Quebec Official Gazette, Oct. 8, 15 and 22.**Judicial Abandonments.*

- ARCHAMBAULT, J. Bte., boot and shoe dealer, Montreal, Oct. 8.
BARRAS, J. Alfred, upholsterer, Quebec, Oct. 19.
BELLEVILLE, Henry, Drummondville, P. Q., Sept. 24.
BLOUIN, jr., Fidele, Quebec, Oct. 18.
CABANA, jr., Antoine, St. Ephrem d'Upton, Oct. 18.
CARON, Alexis E., Shipton, Oct. 1.
GUERTIN, Louis, L'Avenir, Oct. 6.
HÉTU, Henri Arthur, boot and shoe dealer, Montreal, Oct. 11.
LEBRUN, Ludger, l'Isle Verte, Oct. 8.
LEMIEUX, Dlle. Elise, Black Lake, Sept. 29.
MALTAIS, Pierre, Malbaie, Oct. 8.
MERCIER, J. Adelard, parish of St. Michel, Sept. 27.
NADEAU & Co., Maxime (Dame Caroline Rouleau), Fraserville, Sept. 29.
PONTBRIAND, Augustin, St. Guillaume d'Upton, Oct. 18.
TARTE, J. Israël, journalist, Quebec, Sept. 29.
TODD, John Oran, Waterloo, Oct. 1.
WINSHIP & Co., T. J., Montreal, Sept. 26.

Curators appointed.

- ARCHAMBAULT, J. B., boot and shoe dealer, Montreal.—C. Desmarteau, Montreal, curator, Oct. 17.
AUDET, Elie.—Millier & Griffith, Sherbrooke, joint curator, Oct. 5.
BELLEVILLE, Hy.—Bilodeau & Renaud, Montreal, joint curator, Oct. 14.
BOULANGER, J. C., St. François Xavier de Brompton.—Lamarque & Olivier, Montreal, joint curator, Oct. 12.
CHAPDELAIN, J. A.—C. Desmarteau, Montreal, curator, Oct. 4.
CHARETTE, Thomas.—John Hyde, Montreal, curator, Oct. 3.
CUTHBERT & Son, Montreal.—Kent & Turcotte, Montreal, joint curator, Sept. 28.
DEGAGNÉ, J. E., Eboulements.—H. A. Bedard, Quebec, curator, Oct. 8.
ENRIGHT, James, Port Daniel.—W. Hamon, Paspebiac, curator, Oct. 12.
FORTIN & Co., D., St. Prime.—V. E. Paradis, Quebec, curator, Oct. 12.
GALLIPOLI, Victor, restaurant keeper, Montreal.—C. Desmarteau, Montreal, curator, Oct. 8.

GUAY, Louis, St. Isidore.—Lamarche & Olivier, Montreal, joint curator, Oct. 5.

HÉTU, Henri A., boot and shoe dealer, Montreal.—C. Desmar-teau, Montreal, curator, Oct. 19.

LACOURCÈRE, Timoléon, St. Stanislas.—Lamarche & Olivier, Montreal, joint curator, Oct. 13.

LEFEBVRE, Edouard J., Montreal.—Kent & Turcotte, Montreal, joint curator, Oct. 13.

LEFEBVRE & Co., Louis, Quebec.—F. W. Radford, Montreal, curator, Sept. 30.

LEMIEUX, Elise, Black Lake.—H. A. Bedard, Quebec, curator, Oct. 13.

MERCIER, J. A.—N. Matte, Quebec, curator, Oct. 12.

NEVEU, Ernest.—Bilodeau & Renaud, Montreal, joint curator, Oct. 12.

TARTE, J. Israel.—G. L. Kent, Montreal, and G. H. Burroughs, Quebec, joint curator, Oct. 11.

TODD, John Oran, Waterloo.—Fulton & Richards, Montreal, joint curator, Oct. 14.

WINSHIP & Co., T. J.—W. A. Caldwell, Montreal, curator, Oct. 4.

Dividends.

BEGIN, Sr., Jos.—First dividend, payable Oct. 17, F. Valentine, Three Rivers, curator.

BRODEUR & Frère, St. Hyacinthe.—First and final dividend, payable Oct. 25, J. O. Dion, St. Hyacinthe, curator.

BURLAND LITHOGRAPHIC Co.—First and final dividend, payable Nov. 7, J. M. M. Duff, Montreal, curator.

COMPAGNIE d'Imprimerie et de publication du Canada.—First dividend, payable Oct. 26, J. B. Young, Montreal, liquidator.

GUILBAULT & fils, E., Montreal.—First dividend, payable Oct. 11, C. Desmarteau, Montreal, curator.

HUOT & Langevin, Quebec.—First dividend, payable Oct. 25, H. A. Bedard, Quebec, curator.

LANDRY, D. E.—First and final dividend, payable Nov. 8, T. Tardif, Quebec, curator.

MOODIE, Wm., Montreal.—First and final dividend, payable Nov. 2, J. McD. Hains, Montreal, curator.

ROBILLARD & Co., Beauharnois.—First and final dividend, payable Oct. 10, C. Desmarteau, Montreal, curator.

SANSFAÇON, A. A., Quebec.—First and final dividend, payable Nov. 2, G. Darveau, Quebec, curator.

THE LEGAL NEWS.

VOL. XV.

NOVEMBER 15, 1892.

No. 22.

OWNERSHIP OF AN AEROLITE.

A curious question was decided in a recent case before the Supreme Court of Iowa, *Goodard v. Winchell*, as to the ownership of an aërolite. The point was whether the owner of the soil on which it fell, or the first discoverer, was the owner of the stone. The Supreme Court decided in favor of the owner of the soil, and as to the correctness of this opinion, we think there can be no serious question. The following is the substance of the opinion:—

The subject of the dispute is an aërolite, of about sixty-six pounds weight, that “fell from the heavens” on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing “on the earth.” It was in the earth, and, in a very significant sense, immovable; that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as “unclaimed by any owner,” and, because unclaimed, “supposed to be abandoned by the last proprietor,” as should be the case under the rule invoked by appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture and alienation, which, it is claimed, were all the me-

thods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquisitions to soil already owned, by accretion or natural causes. The general rules of the law by which the owners of riparian titles are made to lose or gain by the doctrine of accretion, are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking, as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet and in the same situation? If these exchanges have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of special value to the scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of that soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains for the deposit of boulders, stones and drift upon our prairies by glacier action, and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are tell-tale messengers from far-off lands, and have value for historic and scientific investigation.

It is said that the aërolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well

adapted for use by the owner of the soil as any stone, or, as appellant is pleased to denominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as readily contribute to, the great cause of scientific advancement, as the finder, by chance or otherwise, of these silent messengers. This *aërolite* is of the value of \$101, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose, and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles, even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but under the natural law of its government, it became a part of this earth, and, we think, should be treated as such. It is said by appellant that this case is unique; that no exact precedent can be found; and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in a court of last resort. In the American and English Encyclopedia of Law (volume 15, p. 388) is the following language: "An *aërolite* is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel." It cites the case of *Maas v. Amana Society* (16 Albany Law J., 76, and 13 Ir. Law T., 381), each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Directory states the same rule of law, with the same references, under the subject of "Accretions." In 20 Albany Law J., 329, is a letter to the editor from a correspondent, calling attention to a case determined in France, where an *aërolite* found by a peasant was held not to be the property of the 'proprietor of the field,' but that of the finder. These references are entitled, of course, to slight, if any, consideration; the information as to them being too meagre to indicate the trend of legal thought. Our conclusions are an-

nounced with some doubts as to their correctness, but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our conclusions seem to us nearest analogous to the generally accepted rules of law bearing on kindred questions, and to subserve the ends of substantial justice. The question we have discussed is controlling in the case, and we need not consider others.

COURT OF APPEAL.

LONDON, May 13, 1892.

BAWDEN V. LONDON, EDINBURGH AND GLASGOW ASSURANCE COMPANY. 2 Q. B. Div. [1892] 534.

Insurance—Accident—Knowledge of Agent Imputed to Principal.

B. effected an insurance with the defendant company through their agent against accidental injury. The proposal for the insurance contained a statement by the assured that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and it was agreed that the proposal should form the basis of the contract between him and the company. By the terms of the policy the company agreed to pay the insured £500 on permanent total disablement, and £250 on permanent partial disablement—the policy stating that by permanent total disablement was meant, inter alia, "the complete and irrecoverable loss of sight to both eyes," and by permanent partial disablement was meant, inter alia, "the complete and irrecoverable loss of sight in one eye." At the time when he signed the proposal for the insurance the insured had lost the sight of one eye, a fact of which the defendants' agent was aware, though he did not communicate it to the defendants. The assured during the currency of the policy met with an accident, which resulted in the complete loss of sight in his other eye, so that he became permanently blind.

HELD:—*That it must be taken, first, that the assured had sustained a complete loss of sight to both eyes within the meaning of the policy; secondly, that the knowledge of the defendants' agent was, under the circumstances, the knowledge of the defendants, and that they were liable on the policy for £500.*

Application by the defendants for a new trial, or that judgment might be entered for them.

The Lord Chief Justice directed the jury that the company were, through their agent, Quin, affected with knowledge of the

fact that Bawden was a one-eyed man. The jury found a verdict for the plaintiff for £500, and judgment was entered accordingly.

Sir Charles Russell, Q.C., Ashton Cross and F. Dodd, for defendants.

Gully, Q.C., and Henry, for plaintiff, were not called upon.

LORD ESHER, M. R. We have to apply the general law of principal and agent to the particular facts of this case. The question is, what was the authority of such an agent as Quin? His authority is to be gathered from what he did. He was an agent of the company. He was not like a man who goes to a company and says, I have obtained a proposal for an insurance; will you pay me commission for it? He was the agent of the company before he addressed Bawden. For what purpose was he agent? To negotiate the terms of a proposal for an insurance, and to induce the person who wished to insure to make the proposal. The agent could not make a contract of insurance. He was the agent of the company to obtain a proposal, which the company would accept. He was not merely their agent to take the piece of paper containing the proposal to the company. The company could not alter the proposal; they must accept it or decline it. Quin, then, having authority to negotiate and settle the terms of a proposal, what happened? He went to a man who had only one eye, and persuaded him to make a proposal to the company, which the company might then either accept or reject. He negotiated and settled the terms of the proposal. He saw that the man had only one eye. The proposal must be construed as having been negotiated and settled by the agent with a one-eyed man. In that sense the knowledge of the agent was the knowledge of the company. The policy was upon a printed form which contained general words applicable to more than one state of circumstances, and we have to apply those words to the particular circumstances of this case. When the policy says that permanent total disablement means "the complete and irrecoverable loss of sight in both eyes," it must mean that the assured is to lose the sight of both eyes by an accident after the policy has been granted. The contract was entered into with a one-eyed man, and in such case the words must mean that he is to be rendered totally blind by the accident. That indeed would be the meaning in the case of a man who had two eyes. If the accident renders the man totally blind, he is to be paid £500 for perman-

ent total disablement. Quin, being the agent of the company to negotiate and settle the terms of the proposal, did so with a one-eyed man. The company accepted the proposal, knowing through their agent that it was made by a one-eyed man, and they issued to him a policy which is binding upon them, as made with a one-eyed man, that they would pay him £500 if he by accident totally lost his sight, i. e., the sight of the only eye he had. In my opinion the plaintiff is entitled to recover £500 for the total loss of sight by the assured as the direct effect of the accident.

LINDLEY, L. J. I am of the same opinion. The case turns mainly upon the position of Quin. What do we know about him? The company have given us no information about the terms of his agency. In the printed form of proposal he is described as the agent of the company for Whitehaven, and it is admitted that he was their agent for the purpose of obtaining proposals. What does that mean? It implies that he sees the person who makes the proposal. He was the person deputed by the company to receive the proposal, and to put it into shape. He obtains a proposal from a man who is obviously blind in one eye, and Quin sees this. This man cannot read or write, except that he can sign his name, and Quin knows this. Are we to be told that Quin's knowledge is not the knowledge of the company? Are they to be allowed to throw over Quin? In my opinion, the company are bound by Quin's knowledge, and they are really at tempting to throw upon the assured the consequences of Quin's breach of duty to them in not telling them that the assured had only one eye. The policy must, in my opinion, be treated as if it contained a recital that the assured was a one-eyed man. The £500 is to be payable in case of the "complete and irrecoverable loss of sight in both eyes" by the assured. If the assured has only one eye to be injured, this must mean the total loss of sight. Within the true meaning of the policy, as applicable to a one-eyed man, I think the plaintiff is entitled to recover £500.

KAY, L. J. I agree. The defendants are a limited joint-stock company, and the principal question is whether the knowledge of their agent is to be imputed to them. I am clearly of opinion that it is. The agent, when he obtained the proposal, knew that this man had only one eye. It appears on the face of the proposal that Quin was the agent of the company for the Whitehaven district. What was he agent for? The company have given no evidence about this, but we cannot have better evidence

than what the agent actually did. It was his duty to obtain proposals for assurances, and to send them to the company. It was his duty to get the form of proposal filled up and signed by the proposer, and to see that this was done correctly. Then he goes to a man who has obviously only one eye—he knows that he has only one eye—and he induces him to sign a proposal. The agent fills up the blanks in the proposal in his own handwriting, and it is sent in to the company. In the margin of the form is printed this note: "If not strictly applicable, particulars of any deviations must be given at back," which must mean that if the printed statements in the form are not strictly applicable to the particular case, the respects in which they are not so are to be stated on the back of the proposal. If Quin had performed his duty to the company, who would have written at the back of the proposals the "deviations" in the case of Bawden? I think it was Quin's duty to do this, and to point out to Bawden that without it the form would not be properly filled up. So far as we know, Quin did not convey to the company his knowledge of the fact that Bawden had only one eye; and it is argued, that the policy having been entered into by the company, and the premiums paid to them for some time, the policy is either void, or the company are only liable for a partial disablement of the accused. How is it possible for us to say that the knowledge of Quin is not to be imputed to the company? That knowledge was obtained by him when he was acting within the scope of his authority, and it must be imputed to the company. This is an answer to the argument that the policy is to be treated as void, because the statements in the proposal are not accurate. In my opinion, the condition that the statements in the proposal are to form the basis of the contract does not apply at all, because knowledge is to be imputed to the company of the fact that Bawden had only one eye.

Then it is said that the plaintiff can recover only for partial, not for total, permanent disablement. But, treating the company as knowing that Bawden had only one eye, how ought the policy to be construed? The material words are, "complete and irrecoverable loss of sight in both eyes;" and in my opinion, they ought to be construed as meaning that the company are to pay £500 in case the assured completely loses his sight by means of an accident. This is what has happened in the present case, and therefore, in my opinion, the plaintiff is entitled to recover £500.

Application refused.

QUEEN'S BENCH DIVISION.

LONDON, Oct. 25, 1892.

HOBERN v. FOWLER (27 L. J., N. C.)

Arrest—Privilege from—Plaintiff Returning from Court—Warrant for commitment for Non-payment of Rates.

This was an *ex parte* application to Mr. Justice Collins for the release of a plaintiff in an action just tried before him, who had been arrested upon leaving the Court under a warrant for his commitment for non-payment of poor-rate. The applicant had been called as a witness on his own and on his wife's behalf, she having been a co-plaintiff. Proceedings had been taken against applicant under the provisions of 12 Vict. c. 14, ss. 2, 3, for non-payment of the local poor-rate, and, in default of any distress being possible, a warrant for his commitment had been made out by justices, in accordance with Form D. in the schedule of that Act. That form provides for commitment for a stated time 'unless the said sum of _____, together with the sum of _____ for the costs attending the distress and for the commitment..... shall be sooner paid.' Under the warrant a police-constable had arrested the applicant upon his leaving the Royal Courts of Justice.

Watt for the applicant. The privilege of immunity from arrest in any civil process for any witness going to, attending, or returning from Court, has long been established. Non-payment of rates is not a criminal offence. It is not an arrest for contempt, but only until payment. The distinction between attachment as a mere process and punitive attachment is pointed out by Lord Justice Fry in *In re Freston*, 52 Law J. Rep. Q. B. 545; L. R. 11 Q. B. Div. 557; *Kimpton v. London and North-Western Railway Company*, 23 Law J. Rep. Exch. 556; L. R. 9 Exch. 766, is also in point. The application was properly made 'to the Court in which the cause had been depending, ('Taylor on Evidence,' s. 1205).

COLLINS, J., held that such a commitment as this was, by way of process, only to enforce payment of rates, and not as a punishment for contempt to any order of a Court, and ordered the applicant's release.

Application granted.

RETIREMENT OF MR. JUSTICE DENMAN.

The occasion of Mr. Justice Denman's retirement from the Bench was a memorable one. The Bench was crowded with judges, and the attendance of the Bar was very large.

After some remarks from the Attorney-General, Sir C. Russell, Mr. Justice Denman replied as follows :—

“ It had occurred to me that having the pleasure this morning of attending the Lord Chancellor's breakfast, where I met so many of my brethren and members of the profession, that would be an adequate leave-taking on my retirement from the bench. But I confess I am not sorry that it has been thought by others better that I should submit to what I must regard as the gratifying ordeal of taking leave of you in public. For, large as is the attendance, and illustrious as are the persons who are present on such an occasion, it would not have given me the opportunity I now have in the presence of so many members of the junior bar and many also of the other branch of the profession, thus giving me the opportunity of taking leave of them and of thanking them all for the constant kindness and courtesy I have ever, as a judge, received from them in the course of my long judicial career. (The learned judge here became very much affected, his voice broke, and he spoke with evident emotion.) Mr. Attorney-General, I cannot trust myself to make a long address. But I must try and say a few words to express my sense of the advantages which a man has who holds the office I have held for twenty years, and especially if, as was the case with me, he has known the profession from still earlier days than those which brought him to the bar. I could not help thinking the other day, on an occasion when I thought I might be expected to say something, how many men of eminence, and illustrious in the law, it had been my privilege to know from the earliest days I can recollect to the present time, and I found that, in the twenty years during which I was a judge, I had no less than forty-seven new colleagues, with every one of whom I had personal acquaintance—I have known them all, they have all been friends, they have all been good servants of their country, as those who remain are, and I have no doubt those who may follow will be so too. Between the time when I was called to the bar (in 1846) and the time when I was made a judge there were twenty-six, leaving out those whom I have already spoken of, and reckoning only those who were members of the bench when I was made a judge.

Every one of those men was brought up to the legal profession, had been a student, a member of the junior bar, and afterwards generally a leader. And it is impossible to reflect upon this without feeling what an honor it is to be thought worthy to have been a member of such a profession, which has supplied so many eminent servants of their country in a judicial capacity. Mr. Attorney-General, I also wish to give my testimony to the merits of the other branch of the profession—the solicitors. No doubt we hear with regret every now and then of some yielding to temptation and doing things which have to be visited with serious penalties. But as to the great body of solicitors, of whose conduct we have every day ample experience, I can say that I know of no class of the community to whom the country is more indebted than these men, who know the secrets of families and by whom the interests of their clients are zealously attended to and their secrets inviolably kept. And there is another branch of the profession to whose kind co-operation I as a judge of long standing feel that I ought to pay my tribute, and that is our clerks, to whose good conduct and earnest assistance and honorable abstinence from gossip about things they must know of, it is impossible to say how we are all indebted, nor how much the public are indebted. They are the barristers' clerks; I need not say how valuable they are nor how difficult it would be for the working members of the bar to get through their business without the assistance rendered to them by honest, faithful, and attentive clerks. Then there are the solicitors' clerks, men who really do so much of the business of the profession, which is done often as much by the clerks as the principals. To allude to only one branch of this class of the profession, I should like to give the meed of my hearty thanks to those clerks who come before the judges at chamber and address us on cases before us, often with much acumen and good sense, and who really render efficient assistance in the discharge of business. I do not hesitate to say that by their assistance the work is done in such a way that the public have no idea how much they owe to this class of the members of the profession. I should like, also, to say how much we are indebted to the officers of the courts, the masters or registrars in courts of law or equity, especially the latter, where common law judges have sometimes to attend, and where they must a good deal depend upon the assistance rendered to them by the officers of the courts, who do so much to promote the due discharge of business. Mr. Attorney-General, I do not desire to

speaking about myself—I am averse to egotism or ostentation, and if anyone thinks I have ever shown a tendency to anything of the kind he has misinterpreted me, and misunderstood something I may have perhaps clumsily said. All I wish now to do is to assure you that I shall ever entertain the most cordial sense of the kindness which every member of the profession with whom I have ever been brought in contact has shown to me. I shall always love it. I shall always take an interest in its proceedings, and in all that affects its welfare. Mr. Attorney-General, I thank you for the kind words you have uttered. I have known you long; I have watched your career with the greatest interest, and I believe the profession will never be able to point to a man who could represent it more worthily, nor more ably uphold its honor. And now it only remains for me to say to my brethren, to all the members of the bar, and to all other members of the profession, most earnestly and gratefully, "Farewell."

THE PARK AND LITERARY FRAUD CASES.

At the Old Bailey the week before last the two *causes célèbres* of the September criminal sessions—the prosecution of Miss Smith and her accomplices, Mickelthwaite, Paul, Ingram and Alliston, for conspiracy to defraud the estate of a certain Mr. Park of 20,000*l.* by the forgery of a deed, and the literary frauds case—were at length brought to a close, and ended, as everyone who studied the evidence had expected, in the conviction of the accused.

The forgeries that are exposed and punished in Courts of justice are usually characterised by cleverness as well as daring. Fauntleroy, Roupell, Provis, and Else were persons of genius in their own worthless way, and executed their criminal designs with consummate adroitness. In point of audacity, Miss Smith showed herself to be no mean rival to these illustrious scoundrels, but in cunning and ingenuity she lagged far behind them. A clumsier crime was never perpetrated than that for which she has now to undergo the well-merited punishment of ten years' penal servitude. The material facts in the case were few and simple. On January 4, 1887, there died, in his eighty-second year, at Auckland House, Teddington, a gentleman named John Cornelius Park, who was worth over 100,000*l.* Miss Smith was

one of Mr. Park's tenants, had been in the habit of visiting him from time to time, and was, of course, in possession of his signature to receipts for rent. The relations between the deceased gentleman and Miss Smith had never been very friendly, much less intimate. He had deprecated her visits, and, so lately as June, 1885, had distrained against her for arrears of rent. On two occasions when she had been at Auckland House, Miss Smith had met a son of the deceased, Mr. C. J. Park, who was a widower. Two days after the old gentleman's death a letter from her was received at Auckland House, in which she referred to her 'approaching marriage' with Mr. C. J. Park, and she soon followed up this intimation of her design by presenting herself at Auckland House and announcing that she was the daughter-in-law elect of the deceased, and that if young Mr. Park refused to marry her within three months after his father's death he would have to pay her the sum of 20,000*l*. In spite of this bold verbal assertion of her claim, Miss Smith displayed an unaccountable, and from her point of view a fatal, hesitancy as to the form in which the claim was to be made. First she produced what purported to be a will signed by the deceased on the day of his death across a penny stamp, and giving her all he possessed in the world. On second thoughts, however, she destroyed this document, which was attested by the prisoners Ingram and Alliston—the cook and the gardener at Auckland House—and brought forward a bond in which old Mr. Park was alleged to have covenanted to pay her 30,000*l*. on the day of her marriage with his son, or a penalty of 20,000*l*. if the marriage did not take place. Eventually, this document, too, was abandoned as the mainstay of the claim; Miss Smith took her stand upon a deed, practically to the same effect, purporting to have been signed by the deceased on March 23, 1886, and attested by the prisoners Alliston, Micklethwaite, a solicitor who had been struck off the rolls, and Paul, and opposed the administration of the estate in the High Court. Mr. Justice Romer, however, dismissed her claim, and ordered the document in question to be impounded, expressing the conviction, which has now been corroborated by the verdict of the jury in the criminal proceedings, that it was fictitious. A more transparent forgery was never committed, and the sentences of ten, seven, and five years' penal servitude respectively passed upon Smith, Micklethwaite, and Paul, were amply justified by the circumstances of the case. Alliston and Ingram

(who was found guilty of 'uttering' the forged document only) escaped with twelve and six months' imprisonment respectively.

The literary frauds case was in its own way not less remarkable than the prosecution of Miss Smith. No more impudent series of deceptions has been practised upon the public in recent years than that of which Sir Gilbert Campbell, William James Morgan, David Tolmie, Charles Montagu Clarke, Joseph Sidney Tomkins, and William Henry Steadman have just been found guilty. The history of their misdeeds has all the interest of a romance, is as full of double intrigues and ludicrous situations as a seventeenth-century play, and possesses, besides, those occasional touches of tragedy without which the highest dramatic effects can never be attained. Yet the central plot was a very simple one; and although the *personnel* of the actors changed from time to time during the progress of the piece, it was repeated in every scene with remarkable fidelity. The mode of operation was as follows: A company was started with a pretentious name and a glowing prospectus. At one time it was the City of London Publishing Company (Lim.). Then the Authors' Alliance came on the stage. Next the Literary and Artistic Union was founded. Then came the Artists' Alliance and the International Society of Literary Science and Art. The ostensible objects of these various associations differed, as their titles indicate, but their primary objects were the same. The chief end of them all was to put money in the purses of the promoters. For the attainment of this end a number of devices were adopted. Authors were induced to submit their manuscripts to the society engaged for the time being in working the literary fraud, and to make sundry payments on the distinct undertaking that the manuscripts in question would be published under its auspices; but the manuscripts were not published and the sums paid were never returned. Exhibitions of pictures were organised and carried out on similar principles, although in one case a lady who had subscribed a guinea to the enterprise had a picture sold and received 15s. as the purchase-money. Then a series of concerts, which paid tolerably well, was set on foot. Finally, there were wholesale issues of invitations to artists and authors to join the Artists' and Authors' Alliances, and the International Society of Literary Science and Art, which arrogated to itself the right of granting diplomas, degrees, and graduation hoods and gowns to its members. The profits realised by these artistic, musical and literary efforts were not accounted for, and the presumption is

that they found their way, with almost undeviating accuracy, into the pockets of the gentlemen whose ingenuity had organised the companies in question. Gradually, however, these bodies began to fall into disrepute. Their landlords experienced no little difficulty in securing the payment of their rents, and when the assistance of the County Court was invoked, and a warrant for distress granted, the indignant judgment creditors found either that there was nothing on the company's premises to distrain, or that, in the interval between judgment and execution the promoters had folded their tents, like the Arabs, and silently moved away. The unfortunate authors who had been deprived both of their manuscripts and of their money began to be troublesome. One lady went every day for a month to the offices of the Authors' Alliance, brought her knitting with her in order to pass the time, and waited patiently, but in vain, for the arrival of Tomkins, who was in charge of the establishment. Another of the defrauded children of literature had a happier fate. He found Mr. Tomkins at the company's offices, demanded a manuscript which he had sent to the company, and, when Tomkins explained that the document was in the hands of the reader or publisher, shook him heartily, to the intense delight of the housekeeper, who was looking on. Other followers of the muses took a more public way of expressing their dissatisfaction with the companies by suing them in the Courts of law. The action raised by Mr. Swindell, of Manchester, who was one of the most meritorious victims of the fraud, directed the attention of the Treasury to the matter, and the prosecution was instituted which has now resulted in the conviction of the accused. There were, of course, different degrees of guilt. Morgan and Tomkins, as the worst offenders, were sentenced to eight and five years' penal servitude respectively; while Sir Gilbert Campbell, Steadman, Tolmie, and Clarke were found guilty only of conspiracy to defraud, and were severally sentenced to eighteen, fifteen, six, and four months' imprisonment with hard labour.—*Law Journal (London)*.

Mr. W. A. Bates, whose death is recorded at the age of 66, was an old and respected member of the legal profession. He was admitted to the bar in 1849, and practised during forty-three years, the firm being J. & W. A. Bates. He enjoyed the esteem and respect of his *confrères*, and his death, which was hastened by the effects of a fall, is generally regretted.

INSOLVENT NOTICES.

Quebec Official Gazette, Oct. 29 & Nov. 5 & 12.

Judicial Abandonments.

ADAM, Robert, doing business as Porcheron, Adam & Co., Montreal, Oct. 24.

ARCHAMBAULT, Narcisse, druggist, Montreal, Nov. 3.

BARBEAU, Alexis, roofer, Quebec, Oct. 21.

BRASSARD, Luc-Jean-Baptiste, St. Cyrille of Wendover, Oct. 28.

CHAVANEL, Israel, Quebec, fruit merchant, Oct. 20.

LARIVIÈRE & fils, carriage-makers, St. Hyacinthe, Oct. 22.

MILES, Gabriel, Grand Pabos, Oct. 31.

ROLLAND, J. B. L., Montreal, Oct. 25.

SAVARD, George, bottler, Quebec, Nov. 4.

TISDALE, Emma, doing business as E. Tisdale, St. John's, Oct. 26.

TODD, Dinah, doing business as J. Cohen & Co., Montreal, Oct. 18.

Curators Appointed.

BARBEAU, jr, Alexis, roofer, Quebec.—N. Matte, Quebec, curator, Nov. 2.

BARRAS, J. A., Quebec.—C. Desmarteau, Montreal, curator, Oct. 29.

BELLEAU, Louis, doing business as H. F. Poirier, Montreal.—Kent and Turcotte, Montreal, joint curator, Oct. 27.

BLOUIN, Fidèle, Quebec.—D. Arcand, Quebec, curator, Oct. 27.

BRANCHAUD & DUQUETTE, Montreal.—Kent & Turcotte, Montreal, joint curator, Oct. 29.

BROWN & Co., W. Godbee, Montreal.—J. McD. Hains, Montreal, curator, Nov. 9.

CABANA, fils, Antoine, St. Ephrem d'Upton.—J. O. Dion, St. Hyacinthe, curator, Nov. 7.

CHAVANEL, Israel.—John O'Donnell, Quebec, curator, Nov. 2.

CARON, Alexis E., Shipton.—D. Seath and J. J. Griffith, Montreal, joint curator, Oct. 13.

Côté, P. E.—Millier & Griffith, Sherbrooke, joint curator, Oct. 31.

GAUVREAU & Co., St. Octave de Métis.—Kent & Turcotte, Montreal, joint curator, Oct. 25.

GUERTIN, Louis.—Bilodeau & Renaud, Montreal, joint curator, Oct. 20.

LALONDE, Alphonse.—D. Seath, Montreal, curator, Oct. 6.

LARIVIÈRE & fils, Joseph, St. Hyacinthe.—J. O. Dion, St. Hyacinthe, curator, Nov. 7.

LAURIE, David James, Montreal.—F. W. Radford, Montreal, curator, Nov. 2.

MALTAIS, Pierre, Malbaie.—H. A. Bedard, Quebec, curator, Oct. 29.

NADEAU & Co., M.—Bilodeau & Renaud, Montreal, joint curator, Oct. 24.

PATENAUDE, P. A.—Bilodeau & Renaud, Montreal, joint curator, Oct. 24.

PORCHERON, Adam & Co., roofer, Montreal.—C. Desmarteau, Montreal, curator, Oct. 31.

ROLLAND, J. B. L., boot and shoe dealer, Montreal.—C. Desmarteau, Montreal, curator, Nov. 2.

SLEETH, jr., David, Montreal.—Riddell & Common, Montreal, joint curator, Nov. 7.

TODD, Dinah (J. Cohen & Co.)—C. Desmarteau, Montreal, curator, Oct. 31.

WOOD, Horace E.—A. J. Farnham, Dunham, curator, Nov. 4.

Dividends.

BILODEAU & fils, Ste. Marie.—First and final dividend, payable Nov. 29, H. A. Bedard, Quebec, curator.

BLAIS & Lefebvre.—Second and final dividend, payable Nov. 29, G. H. Burroughs, Quebec, curator.

BLONDEAU & Gravel, curriers.—Second and final dividend, payable Nov. 21, N. Fortier, Quebec, curator.

BOUDREAU, Benj., L'Anse St. Jean.—First and final dividend, payable Nov. 22, H. A. Bedard, Quebec, curator.

DUCHAINE, Octave, St. Jovite.—First and final dividend, payable Oct. 15, A. Lamarche, Montreal, curator.

GUILBAULT & fils, Ed., Montreal.—First dividend, payable Nov. 11, C. Desmarteau, Montreal, curator.

GUIMOND & Cie., St. Raymond.—First and final dividend, payable Nov. 22, H. A. Bedard, Quebec, curator.

LACOUROIERE, Timoléon, St. Stanislas.—First dividend, payable Nov. 28, Lamarche & Olivier, Montreal, joint curator.

MARCOITE, Charles.—First and final dividend, payable Nov. 29, J. E. Casgrain, L'Islet, curator.

MORENCY, Edouard, Quebec.—First and final dividend, payable Nov. 29, J. H. Gignac, Quebec, curator.

POULIN, Anselme.—Second and final dividend, payable Nov. 28, A. F. Gervais, St. John's, curator.

ROBILLARD & Co., Beauharnois.—First and final dividend, payable Oct. 10, C. Desmarteau, Montreal, curator.

SMITH, Joseph, Cedar Hall.—First and final dividend, payable Nov. 29, H. A. Bedard, Quebec, curator.

STEWART, Geo.—Second and final dividend, payable Nov. 21, C. Desmarteau, Montreal, curator.

VAUDREY & Turcotte, grocers.—First and final dividend, payable Nov. 29, H. A. Bedard, Quebec, curator.

THE LEGAL NEWS.

VOL. XV.

DECEMBER 1, 1892.

No. 23.

CURRENT TOPICS AND CASES.

Sir John J. C. Abbott retires and Sir John S. D. Thompson succeeds to the premiership of the Dominion of Canada. These gentlemen have both been distinguished members of the legal profession. In England lawyers have an inconsiderable part in the government of the country, and that part, it is possible, may become even less. In Canada it is almost a matter of course that one member of the legal profession should succeed another in the office of first minister, and it is equally a matter of course that several of the principal offices in the cabinet should be filled by members of the same profession. When we come down to the local administrations it seems to be the exception to find a minister who is not a lawyer. This state of things is not extraordinary seeing the large proportion of lawyers in our legislative bodies, and the absence of training in other classes for public life. It has some drawbacks, as, for instance, the crude taxation scheme adopted at Quebec last session. It is worth noticing, too, that the new premier of Canada, like the premier of Ontario, has already held judicial office and stepped back with remarkable success into the political arena. Some time ago there was a rumour that the retiring lieutenant-governor of Quebec, who has also been a judge, might be summoned to form an administration in this province. It would have been a curious coincidence had the three most im-

portant political positions in the Dominion been occupied at the same time by ex-judges.

Mr. Justice Hall had the pleasure, at the opening of the last criminal term of the Court of Queen's Bench at Montreal, of directing the attention of the grand jury to the important circumstance that there had been six terms of the Court since any prisoner had been found guilty of murder, and that nine years had elapsed since the last infliction of capital punishment in this district. This was not mentioned as an indication that the administration of justice had been lax or that juries had failed in their duty, but as gratifying evidence of the absence of serious crime in the most populous city and district of Canada. Not only in Montreal with its population of a quarter of a million, but throughout the province murder is almost unknown, and even cases of homicide occurring in the heat of quarrels are extremely rare.

The death of Mr. George Macrae, Q.C., on Nov. 30, has removed another of the now fast diminishing group of advocates who were in practice in Montreal before the end of the first half of the century. The deceased was born in June, 1822, and had therefore entered on his seventy-first year. He was admitted to the bar in 1846. For many years past he has confined himself chiefly to the business of the Grand Trunk Railway Company of which he has long been the solicitor. He was a gentleman of high principle, courteous in his intercourse with his professional brethren, and consistently opposed to anything that could reflect discredit upon an honorable profession.

The case of *Legault v. Legault*, decided by Mr. Justice Davidson in the Superior Court, Montreal, June 30, 1892, disclosed a remarkable attempt to incarcerate a sane man in a lunatic asylum. Strange to relate, the affidavits of

several of his own children were available in support of the proceeding. The facts come out incidentally in an action of libel which was instituted subsequently. The case illustrates how widely the ideas of people may differ as to what constitutes insanity, and the care which is necessary in dealing with such statements.

The will case of *Schiller v. Schiller*, decided by the same learned judge on the same day, was another litigation with singular features. In this case the testator, Mr. C. S. Schiller, was a gentleman well known to nearly the whole bar, and the will impugned was made by him twenty-one months before his death. In the interval he was attending to both official and private business, yet his will was attacked on the ground of captation and suggestion, and undue influence. The will was maintained by Mr. Justice Davidson, and the decision, we understand, will not be appealed from.

In *Cushing v. Fortin*, the Court of Review, Montreal, Nov. 30, affirmed the decision of Davidson, J., as to what is required to sustain a charge of sequestration. A restaurant-keeper sold his effects and business, and the leasehold of his restaurant. It appeared, however, that he acted with the concurrence of his lessor who was his principal creditor, and whose privileged claim was sufficient to absorb all the assets. The charge of sequestration was held to be disproved, but as the defendant had acted imprudently in divesting himself of his estate without the knowledge of his other creditors, the *capias* issued by one of them, though not maintained, was set aside without costs.

In *Groulx v. Wilson*, Court of Review, Montreal, Oct. 8, it was held, affirming the decision of Pagnuelo, J., that a carrier who has put the thing transported in a particular place specified in the contract of carriage, is not considered to have thereby dispossessed himself of it, and

his right of retention under Art. 1679, C. C., until he is paid for the carriage, still exists, and may be enforced by conservatory seizure against parties claiming title by purchase, the thing being still in the place where it was deposited by the carrier.

EXCHEQUER COURT OF CANADA.

OTTAWA, September 1, 1892.

Coram BURBIDGE, J.

ARTHUR H. MURPHY, Suppliant; and THE QUEEN, Respondent.

*Sale of Ordnance Lands in Quebec—Cancellation—23 Vic. (P.C.)
c. 2, s. 20.*

In the year 1876 the suppliant purchased a number of lots at an auction sale of Ordnance lands in the City of Quebec. He paid certain instalments and interest thereon, amounting in all to a sum of \$2,447.92. Being unable to complete the payments for which he was liable, he applied to the Crown in 1885 to appropriate the money paid by him to the purchase of three particular lots,—Nos. 19, 38 and 39. This the Crown consented to do, and upon an adjustment of the account there was found to be a sum of \$73.92 due to the suppliant, which, by mutual arrangement, was appropriated to the purchase of another lot (No. 100), leaving a balance then due to the Crown of \$126.08. When however the suppliant came to pay this balance and get his patents for the four lots, he was informed that lot 19 would probably be required for certain military purposes. He then tendered the balance due to the proper officer of the Crown in that behalf, but it was declined. Patents for lots 38, 39, and 100 were subsequently issued to suppliant, and nothing further was done until 1886, when the Crown resumed possession of lot 19 which was followed up by an attempted cancellation of the sale of the lot under 23 Vic. (P.C.), c. 2, on the ground that as the balance due on the purchase had not been paid the terms and conditions of sale had not been complied with.

Held.—That the sale was not duly cancelled, that the suppliant had forfeited none of his rights under the sale, and was entitled to damages equal to the value of the lot at the time the Crown resumed possession thereof.

Quære.—Has the Deputy Minister of the Interior the right to exercise the powers of cancellation vested in the Commissioner of Crown Lands by the 20th section of the Act of the old Province of Canada, 23 Vic. c. 2 ?

JOHN DE KUYPER & SON, v. VAN DULKEN WIELAND & COMPANY.

Trade Mark—Rectification of Register—Jurisdiction of Exchequer Court—54-55 Vic. c. 26 ; 54-55 Vic. c. 35.

The Court has jurisdiction to rectify the register of trade marks in respect of entries made therein without sufficient cause either before or subsequent to the 10th day of July, 1891, the date on which the Act 54-55 Vict. c. 35, came into force.

Quære ? Has the Court jurisdiction to give relief for the infringement of a trade mark where the cause of action arose out of acts done prior to the passage of the Act, 54-55 Vict. c. 26 ?

HORMISDAS MARTIAL, Suppliant ; and THE QUEEN, Respondent.

Tort—Injury to the Person on a Public Work—Remedy—Prescription, Interruption of—C.C.L.C. Art. 2227—50-51 Vic., c 16.

The suppliant, who was employed as a mason upon the Chambly Canal, a public work, was injured through the negligence of a fellow-servant. Subsequent to the accident the Crown retained the suppliant in its employ as a watchman on the Canal, and indemnified him for expenses incurred for medical attendance.

Held, that what was done was referable to the grace and bounty of the Crown and did not constitute such an acknowledgment of a right of action as would, under art. 2227 C.C.L.C. interrupt prescription.

Quære.—Does art. 2227 C.C.L.C. apply to claims for wrongs as well as to actions for debt ?

Semble. That the Crown's liability for the negligence of its servants rests upon statutes passed prior to the Exchequer Court Act (50-51 Vic. c. 16) ; and that the latter substituted a remedy by petition of right, or by a reference to the Court, for one formerly existing by a submission of the claim to the Official Arbitrators, with an appeal to the Exchequer Court and thence to the Supreme Court.

JACQUES COUETTE ET AL., Suppliants; and THE QUEEN, Respondent.

Maritime law—Salvage—Government vessel—Special contract.

A steamship belonging to the Dominion Government went ashore on the island of Anticosti, and suppliants rendered assistance with their wrecking steamer in getting her afloat. The service rendered consisted in carrying out one of the stranded steamship's anchors and in taking a hawser and pulling on it until she came off. For carrying out the anchor it was admitted that the suppliants had bargained for compensation at the rate of \$50 an hour, but whether the bargain included the other part of the service rendered or not was in dispute. The service was continuous,—no circumstances of sudden risk or danger having arisen to render one part of the work more difficult or dangerous than the other.

Held, that the rate of compensation admittedly agreed upon in respect of carrying out the anchor must, under the circumstances, be taken as affording a fair measure of compensation for the entire service.

2. A petition of right will not lie for salvage services rendered to a steamship belonging to the Dominion Government.

CHARLES LAVOIE, Suppliant; and HER MAJESTY THE QUEEN, Respondent.

Liability of Crown as common carrier—Negligence—Regulations for carriage of freight—Notice by publication in Canada Gazette—The Government Railways Act, 1881—The Exchequer Court Act (50-51 Vic. c. 16, s. 16)—Construction.

Apart from Statute the Crown is not liable for the loss or injury to goods or animals carried by a Government Railway occasioned by the negligence of the persons in charge of the train by which such goods or animals are shipped. By virtue of the several Acts of the Parliament of Canada, relating to Government Railways and other public works, the Crown is in such a case liable, and a petition of right will lie under the Act 50-51 Vic. c. 16 for the recovery of damages resulting from such loss or injury.

The Queen v. McLeod (8 Can. S. C. R. 1) and *The Queen v. McFarlane* (7 Can. S. C. R. 216) distinguished.

2. The publication in the *Canada Gazette* in accordance with the provisions of the Statute under which they are made, of

regulations for the carriage of freight on a Government Railway, is notice to all persons having occasion to ship goods or animals by such Railway.

3. One of the general conditions of the regulations applicable to the carriage of live stock by the Intercolonial Railway is that "all live stock conveyed over the Railway are to be loaded and discharged by the owner, or his agents, and he undertakes all risks of loss, injury, damage and other contingencies in loading, unloading, transportation, conveyance, and otherwise, no matter how caused."

By the 50th Section of the Act, (R. S. C. c. 38) under which the regulations were made, it is provided that Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damages arising from the negligence, omission or default of any officer, employee or servant of the Crown.

Held, that the regulation must be read as part of the Act (R. S. C. c. 38, s. 44), and that the condition did not relieve from liability where the loss or injury was occasioned by the negligence of the Crown's servants.

4. The owner of a horse shipped in a box car, the doors of which can only be fastened from the outside, and who is inside of the car with the horse, has a right to expect that the conductor of the train will see that the door of the car is closed and properly fastened before the train is started.

OTTAWA, October 31, 1892.

THE CANADIAN COAL AND COLONIZATION COMPANY (limited),
Claimants; and HER MAJESTY THE QUEEN, Respondent.

Sale of Dominion Lands—Reservation of mines and minerals—The Dominion Lands Act (43 Vict. c. 26)—Rights of purchaser.

Where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by any law affecting such lands, and there is no stipulation to the contrary express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words.

COURT OF REVIEW.

MONTREAL, October 31, 1891.

Coram Sir F. G. JOHNSON, C.J., LORANGER and TELLIER, JJ.
PIKE RIVER MILLS Co. v. PRIEST.

Capias—Affidavit—Allegation of indebtedness.

- HELD:—1. *That an affidavit for capias is not void for uncertainty because it sets out several causes of indebtedness for a like amount (as in a declaration with the common counts), so long as it is clear that the allegations all relate to one and the same sum of money.*
2. *The omission to annex an account referred to in the affidavit, is not material, the law requiring only the oath of the creditor or his agent.*

INSCRIPTION IN REVIEW of a judgment of the Superior Court, district of Bedford, LYNCH, J., June 9, 1891, which reads as follows:—

“Considering that the affidavit upon which the writ of *capias ad respondendum*, in this cause issued, is based, does not sufficiently set forth the cause or nature of the alleged indebtedness of defendant;

“Considering that several causes of action for a similar amount are set forth in said affidavit, rendering it uncertain what the real cause of action, relied on by plaintiff, is;

“Considering that there is no sufficiently specific allegation, in said affidavit, of the time of the alleged sequestration clearly showing that it took place subsequent to defendant's indebtedness;

“Doth grant said petition, and doth quash, annul and set aside said writ of *capias ad respondendum*, and doth order the discharge and liberation of said petitioner thereunder, with costs.”

JOHNSON, Ch. J. (in Review):—

The defendant, arrested under a *capias ad respondendum*, petitioned for discharge, and alleged as grounds of his petition that the affidavit was defective. A *saisie-arrest* also issued upon the same affidavit, and there was another petition as to that. The same grounds substantially were alleged in both petitions, and judgment was given quashing both writs. The plaintiff inscribes here, and we have to consider the grounds taken by the defendant with reference to the sufficiency of this affidavit in both cases.

The petition amplified the grounds for liberation, but the judgment noticed only two: First, as regards the *capias*, it was held

that the affidavit did not sufficiently set forth the cause or nature of the indebtedness, several causes of action for a *similar* amount being set forth, rendering it uncertain what was the real cause of action. Then, as regarded the *saisie-arêt*, it was held that the time of the sequestration, whether before or after the indebtedness, did not sufficiently appear. Let us see the terms of this affidavit. It said that "The defendant is personally indebted to the said Pike River Mills Company in a sum exceeding forty dollars currency, to wit, in the sum of \$9476, as and for the price and value of goods, wares and merchandise by the said company sold and delivered to the said defendant and at his request at Notre Dame de Stanbridge, in the district of Bedford, on and before the 1st day of January last past—and within five years previous to said last mentioned date—and as and for moneys paid and advanced by said company to and for the said William H. Priest (defendant) and for his profit and advantage and at his request, to divers persons named in the statement of account therewith produced and filed on and before the 1st day of January then last past ;

"And in a like further sum of money for so much money found to be due and owing by the said defendant to the said company upon an account then and there. to wit. at Notre Dame de Stanbridge, in the district of Bedford, on or about the said 1st day of January then last past, stated between them ;

"And for a like further sum of money due and owing for interest accrued upon large sums of money for long periods of time, forborne according to the usage of trade and the custom of merchants in that behalf and according to an agreement had and made between the said parties ;

"All which said several sums of money said defendant then and there acknowledged to owe and promised to pay, etc.; and the said sums of money amounting to the aforesaid sum of \$9,476, are overdue and unpaid ; and the said defendant being so indebted to said plaintiff has secreted and made away with his property and effects with intent to defraud his creditors in general and the plaintiff in particular."

Two things are apparent from the reading of this affidavit, which are, in my opinion, decisive of the invalidity of the holding in the Court below. In the first place the several causes of indebtedness in this sum of \$9,000 odd. are alleged in express terms, to refer to the one and same sum of money. Therefore,

the ground taken by the Court below, viz., that several causes of action for a *similar* amount are set forth, and so lead to uncertainty, vanishes, and it appears by the express words used that the several causes, etc., refer not merely to a *similar* amount, but to the one identical same amount alleged to be due, that is the \$9,476, about which, therefore, there can be no uncertainty at all. All the deponent has done is to accumulate various forms of statement of the same debt, just as they used to be accumulated in declarations with what were called the common counts, but all leading to the one conclusion that the same debt and no more was sought to be recovered by the action, just as the same debt and no more is what the defendant is to be held to give bail for here.

It was argued for the defendant that you could not indict for perjury upon such an affidavit as this. I fail to see that. You could not convict for perjury unless there was knowing and corrupt false swearing, and, therefore, there would be no perjury here unless these several statements referred to several debts while only one was due, which they clearly do not. This point is not new. An affidavit to hold to bail, though bad in part, may be efficient for the remainder. (See *Patterson et al. v. Burne*, 3 Rev. de Lég. 347). In *Green v. Hatfield* (12 L. C. R. 115) it was held that an affidavit may contain several different averments of debt inconsistent with one another, and is not void because one of them is insufficient. In the present case we have an averment of the defendant's promise to pay. That alone would be sufficient, according to the holding in *Kenny v. McKeown*, 9 L.C.J. 104. The case of *Maguire v. Link*, 16 L.C.R. 372, cited for the defendant, is plainly against him. In the judgment of the Court no reasons are given; but in the summary prefixed to the report (by whom reported I do not know), it is stated to be that the affidavit was bad for not directly stating that the money paid, laid out and expended was so paid to the use of the defendant. If this is correct, the case would not apply here at all; but whether or no, the case of *Prior v. Lucas* cited by Mr. Justice Williams in giving judgment in *Jones v. Collins* (5 Dowl. Rep. 533) seems to uphold the view we take in the case before us.

Objection was also made to the mention in the affidavit of an account which it alleged was produced along with it, while none was, in fact, produced. We see nothing in that. A reference to proof other than that required by the statute—which is only the oath of the creditor or his agent—need not have been made, and, there-

fore, its absence is immaterial. The case of *St. Michel v. Vidler* (M. L. R., 1 S. C., p. 164), a case very much resembling the present one, decided that point.

We, therefore, hold the affidavit to contain the essential allegations of the debt, the amount, and the promise to pay. We further hold that the allegation of secretion is sufficient, and we dismiss the petitions to quash both as regards the *capias* and the *saisie-arrêt*.

The judgment of the Court of Review is as follows :—

“ Considering that there is error in the judgment of the Court below, rendered on the 9th of June, 1891, doth reverse the same, and proceeding to render the judgment that the Court below should have rendered ;

“ Considering that the defendant petitioned to be liberated from arrest under a *capias ad respondendum*, and also to quash the writ, as well as to quash the writ of *saisie-arrêt* in the said cause issued ;

“ Considering that the plaintiffs contested both petitions ;

“ Considering that the grounds of said petitions and of each of them are insufficient to obtain the conclusions thereof ; that there is no uncertainty as to the amount alleged by the plaintiffs' affidavit to be due to them, and for which both writs were issued, and further that the alleged secretion is sworn to have taken place after the defendant was so indebted to the plaintiffs ;

“ Doth maintain the plaintiffs' contestation of both the said petitions, and doth dismiss both said petitions, with costs in this Court and the Court below.”

Judgment reversed.

Baker & Martin for plaintiffs.

J. C. McCorkill for defendant, petitioner.

THE PARKMAN-WEBSTER CASE.

On December 27, 1849, the city of Boston was startled with the news that portions of a human body had been discovered underneath the chemical laboratory of Professor John W. Webster in the medical college, which then stood in North Grove Street, and that Professor Webster himself had been arrested and incarcerated in Leverett Street Gaol on suspicion of having been concerned in the murder which had obviously been committed. The excited populace had, however, no idea that the discovery which interested and agitated it that winter morning

would lead to one of the strangest cases of the identification of human remains in the whole history of crime.

In the early part of the preceding November, Professor Webster had become indebted to Dr. George Parkman, one of his colleagues, for a sum of nearly \$500, the repayment of which was secured by two promissory notes and a mortgage. Dr. Parkman had called at the college on the 23rd of that month to press his debtor for payment, and had on the same day mysteriously disappeared. His friends received a number of anonymous letters and messages (afterwards proved to have been despatched by Dr. Webster) containing all sorts of suggestions and explanations with regard to his disappearance. But none of the clues led to any unravelling of the skein. The offer of a reward of \$1,000 yielded better results. North Grove Street College was built upon walls which rested upon piles, and the tide ebbed and flowed through apertures below the basement floor between the compartments formed by the walls. One of these compartments was a vault underneath Professor Webster's laboratory. It occurred to the ingenious mind of a man named Lichfield, one of the college servitors, that Dr. Parkman's body might possibly be secreted in this vault. He forced his way through to it with the aid of a crowbar, and found, not Dr. Parkman's whole body, but certain portions of human remains—a stomach, a right leg, and a right thigh. The police at once arrested Professor Webster, and thoroughly searched his rooms in the college. Fresh discoveries of importance were soon made. In a nook in the laboratory a tea-chest was found which contained a man's back and ribs, and in between the ribs there was thrust a left thigh. These were covered over first with tan, and above that was a layer of mineral substances. Bloodstains were traced from the counter in the lecture-room to a trapdoor communicating with the vault in which the first remains had been found. A pair of black-ribbed trousers with the name of Professor Webster written upon them, a pair of slippers and a saw belonging to him, upon each of which there were marks of blood, were also detected; and the soles of the slippers bore the appearance of having been used in treading down tan. But the most important discovery of all was a set of artificial teeth. When Professor Webster was put upon his trial the prosecution called as one of their principal witnesses an American dentist, who deposed that he had been consulted by Dr. Parkman professionally, and that the deceased gentleman's mouth had a peculiar deformity which forcibly

attracted his attention. He then produced the model from which the set of teeth made for Dr. Parkman had been prepared, and the teeth found in Dr. Webster's laboratory fitted them to the smallest and most unusual points of peculiarity. The fact that Professor Webster had in his possession the securities for his debt without being able to show that it had been discharged, made the case for the prosecution circumstantially complete. The jury which tried him brought in a verdict of guilty after ten minutes' deliberation, and he was sentenced to death. By an extraordinary procrastination on the part of the Government, five months were allowed to elapse between the conviction and the execution of the criminal—a phenomenon which may yet be witnessed in England when a Court of Criminal Appeal is established. Like all scoundrels of his class, Professor Webster spent the greater part of his days of grace in a pitiable attempt at once to prepare for the next world and to clear his reputation in the eyes of society. He admitted that he had killed Dr. Parkman, but alleged that he had done so in a fit of passion provoked by the taunts of the deceased. The American Executive declined, however, to accept this specious excuse or to stay the arm of justice. Dr. Webster was duly executed, and no doubt can remain in the mind of any reasonable man who studies the facts of the case that he murdered Dr. Parkman with the express purpose of gaining possession of the evidences of his indebtedness without discharging it.—*Law Journal (London.)*

RESPONSIBILITIES OF RAILWAY COMPANIES.

Damage was done in transit to a consignment of goods sent by plaintiffs from London to Manchester on the line of the Great Northern Railway (defendants). The plaintiff sued in the Manchester County Court to recover this damage. The goods in question, however, were electrical fittings in china and porcelain, which were packed in four cases, and, it transpired, were described as hardware and sent at the company's risk. The company maintained that the packing was insufficient, and that the goods were wrongly described for the purpose of securing to the plaintiff a cheap rate of carriage. The judge apparently took this view, and non-suited the plaintiff (*Connelly v. The Great Northern Railway Company*). He pointed out that the company's servants would not handle with the same care goods which they understood to be hardware as they would a case of china.

In a case before the Liverpool County Court the plaintiff's cart with a load of straw was passing over a bridge when the defendants' locomotive underneath emitted a number of sparks, with the result that the straw blazed up, and so rapid was the destruction of the straw and cart that the horses were barely saved. Counsel for the plaintiff referred to the liability of railway companies in such cases, saying a company was bound to construct its locomotives with all appliances known to science for the purpose of preventing the emission of sparks. If this were done a plaintiff had to establish negligence on the part of the driver or stoker. He urged that in this case the great quantity of sparks emitted was in itself evidence of negligence. Counsel for the defence submitted that, unless the plaintiff could satisfy a jury that there was negligence on the part of the company's servants, the mere fact of sparks being emitted and setting fire to the straw in question would not establish the liability of the company. The best-constructed engines emitted sparks occasionally, and when this was not due to carelessness there was no liability at law. His Honour endorsed the views of the defendants' counsel that, the construction of the engine not having been questioned, there was no liability on the part of the defendants, unless the plaintiff could show there had been carelessness in working the engine. The jury, however, found for the plaintiffs for the full amount claimed.—(*Rimmer v. The London and North-Western Railway Company*).

PROCEEDINGS IN APPEAL.—MONTREAL.

Tuesday, November 15, 1892.

Ouellette & Corporation de Lachine.—Heard—C.A.V.

Desrosiers & Cameron.—Settled out of Court.

Wednesday, November 16.

Burland & Crilly.—Heard.—C.A.V.

Thursday, November 17.

Smith & Davis.—Heard—C.A.V.

Filiatrault & Goldie.—Heard.—C.A.V.

Mitchell & Trenholme.—Heard.—C.A.V.

Friday, November 18.

Rough & E. T. Bank (Two cases).—Part heard.

Saturday, November 19.

Rough & E. T. Bank.—Hearing closed.—C.A.V.

Letang & Piché.—Part heard.

Monday, November 21.

Letang & Piché.—Hearing closed.—C.A.V.

Tuesday, November 22.

Lafond & Corporation de la paroisse de St. George de Henryville.
(Two cases).—Heard.—C.A.V.

Pepin & Touchette.—Part heard.

Wednesday, November 23.

Pepin & Touchette.—Hearing closed.—C.A.V.

Pepin & Chamberland.—Heard.—C.A.V.

Thursday, November 24.

McCarthy & Renouf.—Part heard.

Friday, November 25.

Belair & Filiatrault.—Hors de cour.

McCarthy & Renouf.—Hearing continued.

Saturday, November 26.

Campbell & Riendeau.—Judgment of Circuit Court, Terrebonne,
May 16, 1891, confirmed.

Fogarty & Fogarty.—Judgment of Superior Court, Montreal,
Gill, J., Nov. 3, 1890, confirmed.

St. Lawrence Sugar Refining Co. & Ives.—Appeal from judgment
of Superior Court, Montreal, Loranger, J., May 12, 1890. Judg-
ment reformed and reduced to \$700, with costs in favor of respon-
dent in Court below; costs of appeal against respondent.

Legault dit Deslauriers & Boileau.—Judgment of Superior
Court, Montreal, Pagnuelo, J., March 20, 1891, confirmed.

Auger & Cornellier.—Judgment of Court of Review, Montreal,
May 30, 1891, confirmed.

Molleur & Ville de St. Jean.—Judgment of Superior Court,
Iberville, Chagnon, J., Feb. 20, 1892, confirmed.

Bury & Murphy.—Judgment of Superior Court, Montreal,
Wurtele, J., Sept. 8, 1890, confirmed.

Doutre & Bourbonnais.—Judgment of Superior Court, Beauhar-
nois, Belanger, J., April 7, 1891, confirmed.

Montreal Watch Case Co. & Bonneau.—Judgment of Superior
Court, Montreal, Loranger, J., May 20, 1890, confirmed.

Appeals declared abandoned :—Lockerby & McCaffrey; Mooney
& Sicotte; Poulin & Fatt; Rolland & Laframboise.

McCarthy & Renouf.—Hearing closed.—C.A.V.

The Court adjourned to Dec. 23.

INSOLVENT NOTICES.

Quebec Official Gazette, Nov. 19 & 26.

Judicial Abandonments.

BERNARD, Jos. S., Cap St. Ignace, Nov. 19.

DESCHESE, Anna, doing business as Bellay & Co., Fraserville,
Nov. 10.

HEBERT, Calixte, St. Clothilde de Horton, Nov. 11.

THOMPSON, Wm. et al., doing business as "The St. Timothée Manufacturing Company," Montreal, Nov. 16.

UPTON Shoe Company, Upton, Nov. 15.

Curators Appointed.

ARCHAMBAULT, Narcisse, druggist, Montreal.—C. Desmarteau, Montreal, curator, Nov. 11.

BRASSARD, Louis Jean Bte.—E. A. Piché, Drummondville, curator, Nov. 16.

FORTIN, Louis, Ste. Cunegonde.—T. Gauthier, Montreal, curator, Nov. 11.

HEBERT, Calixte, St. Clothilde de Horton.—A. Quesnel, Arthabaskaville, curator, Nov. 24.

PONTBRIAND, Augustin, St. Guillaume.—C. Desmarteau, Montreal, curator, Nov. 2.

SAVARD, George.—G. Darveau, Quebec, curator, Nov. 15.

TISDALE, Dame Emma, St. John's.—C. Desmarteau, Montreal, curator, Nov. 11.

GENERAL NOTES.

TRIAL BY JURY IN INDIA.—There can be no doubt that the jury system works very badly in India generally, and is almost valueless except as a great factor in educating the masses. In a recent case at Benares a man was tried, by the sessions judge, on a charge of committing a brutal outrage on his sister-in-law, aged eight years. Four out of five jurymen returned a verdict of "not guilty," but the judge refused to accept it, and referred the case to the High Court, who said: "We have read the evidence in this case and the judge's charge. The judge correctly drew the attention of the jury to the material facts and to the law, and having regard to the man's own statement, and to uncontradicted evidence for the prosecution, and to the accused's conduct, we fail to understand how any one of these four jurymen, having regard to his oath, could have returned a verdict of "not guilty." If jurymen, in cases so clear as this was, will not do their duty, it may be necessary, for the protection of the public at large and for repression of crimes now tried by juries, seriously to consider the fitness of the jury system for certain parts of the country. In our opinion the guilt of the prisoner was not, on the evidence, open to any doubt whatsoever; and the only explanation of the finding of those four jurymen was a wilful determination on their part not to do their duty. The judge rightly refused to accept that verdict; we set it aside, and convict and sentence the prisoner, under section 376 of the Indian Penal Code, to be rigorously imprisoned for seven years." —*Indian Jurist*.

THE LEGAL NEWS.

VOL. XV.

DECEMBER 15, 1892.

No. 24.

CURRENT TOPICS AND CASES.

An important contribution to the jurisprudence on the subject of gaming transactions was made by Mr. Justice Doherty, in the Superior Court, Montreal, in deciding the case of *Perodeau v. Jackson*, on the 10th December, 1892. It appeared that the plaintiff had deposited a sum of money in the hands of defendants, his brokers, as margin for speculative stock transactions which, admittedly, were mere *jeux de bourse*. After the transactions were completed a certain sum remained in the hands of the brokers, and this was the amount claimed by the plaintiff. The Court held that an action lay for the recovery of the balance, which appeared by an account rendered by the brokers, after deduction of all losses incurred in the transactions. The Court treated the deposit of margin as a pledge, and held that the illicit nature of the debt to secure which a pledge is given, is not a ground which the pledgee can invoke as entitling him to retain the pledge,—more especially where the pledge is given, as in the present case, to secure merely an eventual indebtedness, which, whether licit or illicit, has never existed, the event on which it was to come into existence not having occurred.

In *Adams v. Boucher*, the Court of Review, Montreal, Nov. 30, 1892, decided an interesting point as to the

jurisdiction of the Circuit Court. It was held, on contestation of declaration of a garnishee, in a case before the Circuit Court, that that Court has jurisdiction to pronounce upon the validity of a deed invoked by the garnishee to prove title to goods in his hands, though the consideration mentioned in the deed exceed \$200.

In *Turnbull v. Travellers' Insurance Co.*, Court of Review, Montreal, Nov. 30, 1892, Mr. Justice Doherty, delivering the judgment of the Court, decided an important point as to non-suits in our practice. It was held that the judge presiding at a jury trial has no power to non-suit a plaintiff save in the two cases provided for by Articles 394 and 395, C. C. P., that is, either where the plaintiff does not appear at the time and place fixed for the trial, or where, having so appeared, he, at any time during the trial and before verdict, withdraws from Court and abandons his suit,—the effect of such non-suit being in either case to dismiss the plaintiff's action, but permit his beginning anew. Any variation of these rules which may exist in modern English practice cannot affect our procedure which is based upon the system as it existed in England at the time of its introduction into this country.

The office of Chief Justice of the Supreme Court of Canada, vacated by the death of the late Chief Justice Ritchie, has been filled by the appointment, on the 13th instant, of Mr. Justice Strong, a puisne judge of the Court. Mr. Justice Strong has been a member of the Court since it was constituted, and was, at the time of appointment, the senior justice. Mr. Justice Strong's place, at date of writing, has not been filled.

Mr. T. C. deLorimier, Q.C., is the third of the elder members of the Montreal Bar who have passed away within a brief period. Mr. deLorimier, who was in his fifty-sixth year, was admitted in 1861, and practised for

many years with his brother, now Mr. Justice deLorimier. The firm enjoyed a very extensive practice, and the deceased, who was deservedly very popular, will be greatly missed by his professional brethren.

SUPREME COURT OF CANADA.

OTTAWA, Nov. 3, 1892.

Quebec.]

COUTURE v. BOUCHARD.

Supreme & Exchequer Courts amending Act, 1891—54-55 Vic., ch. 25, s. 3—Appeal from Court of Review—Case standing over for judgment—Amount necessary for right of appeal—Arts. 1178 & 1178 (a) C. C. P.

The action in this cause was for \$2,006, and the case was argued and taken *en délibéré* by the Superior Court sitting in review on the 30th September, 1891, the day on which the Act 54-55 Vic., ch. 25, s. 3, giving a right of appeal from the Superior Court in Review, to the Supreme Court of Canada, was sanctioned, and the judgment appealed from was rendered a month later. On appeal to the Supreme Court of Canada,

Held, Per Strong, Fournier and Taschereau, JJ., that the respondent's right could not be prejudiced by the delay of the Court, and under the ruling of *Hurtubise v. Desmarteau* (19 Can. S. C. R. 562), the case was not appealable.

Per Gwynne and Patterson, JJ. That the case did not come within the words of sec. 3, ch. 25, 54-55 Vic., inasmuch as the judgment, being for less than £500 sterling, was not a judgment from which the appellant had a right of appeal to the Privy Council in England. Arts. 1178, 1178 (a) C. C. P.

Appeal quashed with costs.

T. C. Casgrain, Q.C., for motion.

Pelletier, contra.

OTTAWA, Oct. 10, 1892.

Quebec.]

O'SHAUGNESSY v. BALL.

36 Vic., ch. 81 (P. Q.)—Booms—Proprietary rights—Replevin—(Revendication)—Estoppel by conduct.

O'S., claiming to be the legal depositary, and T. McC., claiming to be the usufructuary, of certain booms, chains and anchors in the Nicolet River, under 36 Vic., ch. 81, and which G. B., being

in possession of the same for several years under certain deeds and agreements from T. McC., had stored in a shed for the winter, brought an action *en revendication* to replevy the same, and for \$5,000 damages.

Held, affirming the judgment of the Court below, that O'S. and T. McC. were not entitled to the possession as alleged, and that they were precluded by their conduct and acquiescence from disturbing G. B.'s possession. See *Ball v. McCaffrey*, (20 Can. S. C. R. 317).

Appeal dismissed with costs.

Solicitor for appellants: *M. Honan*.

Solicitor for respondent: *P. N. Martel*.

OTTAWA, Oct. 10, 1892.

Quebec.]

BAPTIST V. BAPTIST.

Appeal—Final judgment—Action en reprise d'instance—Art. 439, C. C. P.—R. S. C., ch. 135, secs. 2, 24 & 28.

In an action brought to set aside a deed of assignment the plaintiff died before the case was ready for judgment, and the respondent having petitioned to be allowed to continue the suit as legatee of the plaintiff under a will dated the 17th November, 1869, the appellant contested the continuance on the ground that this will had been revoked by a later will, dated 17th January, 1885. The respondent replied that this last will was null and void, and upon that issue the Court of Queen's Bench for Lower Canada (Appeal side), reversing the judgment of the Superior Court, declared null and void the will of 17th January, 1885, and held the continuance of the original suit by respondent to be admitted. On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the judgment appealed from was an interlocutory judgment, and it was

Held, that the judgment was *res judicata* between the parties, and final on the petition for continuance of that suit, and therefore appealable to this Court. R. S. C., ch. 135, secs. 2 and 28. *Shaw v. St. Louis* (8 Can. S. C. R. 385) followed.

Motion refused with costs.

Lafleur for motion.

Stuart, Q.C., contra.

OTTAWA, Oct. 10, 1892.

Quebec.]

PARADIS v. BOSSÉ.

*Costs of proceedings before Exchequer & Supreme Courts of Canada—
Solicitor and client—Quantum meruit—Parol evidence—Art.
3597, R. S. Q.*

In proceedings before the Exchequer and Supreme Courts, there being no tariff as between attorney and client, an attorney has the right to establish the *quantum meruit* of his services by oral evidence in an action for his costs.

Appeal dismissed with costs.

Mr. Belcourt and *Mr. Mackay* for appellant.*Mr. Casgrain, Q.C.*, for respondent.

OTTAWA, Oct. 10, 1892.

Quebec.]

EMERALD PHOSPHATE CO. v. ANGLO-CONTINENTAL GUANO WORKS.

*Mining lands—Bornage—Injunction—Appeal—Jurisdiction—
R. S. C., ch. 9.*

In case of a dispute between adjoining proprietors of mining lands, where an encroachment is complained of and it appears that the limits of the respective properties have not been legally determined by a *bornage*, the Court of Queen's Bench (Appeal side) held that an injunction would not lie to prevent the alleged encroachment, the proper remedy being an action *en bornage* (M. L. R., 7 Q. B. 196).

On appeal to the Supreme Court of Canada:—

Held, that as the matter in controversy did not put in issue any title to land where the rights in future might be bound, the case was not appealable. R. S. C., ch. 139, sec. 29 (b).

Appeal quashed with costs.

Laflamme, Q.C., and *Cross* for the appellant.*McCarthy, Q.C.*, and *Foran* for the respondent.

OTTAWA, Oct. 6, 1892.

Quebec.]

TREMBLAY v. BERNIER.

*Notarial Code—R. S. Q., Art. 3871—Board of Notaries—
Disciplinary powers—Prohibition.*

When a charge derogatory to the honour of the profession of

notary is made against a notary under the provisions of the Notarial Code, R. S. Q., Art. 3871, which amounts to a crime or felony, the Board of Notaries has jurisdiction to investigate it without waiting for the sentence of a Court of criminal jurisdiction.

Appeal dismissed with costs.

Belcourt, Q.C., for the appellant.

Frémont and Languedoc for the respondents.

OTTAWA, Nov. 2, 1892.

Quebec.]

THE RICHELIEU ELECTION CASE.

Election petition—Status of petitioner—Preliminary objection—Lists of voters—Dominion Elections Act, R. S. C., ch. 8, secs. 30 (b), 31, 33, 41, 54, 58 & 65—The Electoral Franchise Act—R. S. C., ch. 5, sec. 32.

Held, affirming the decision of Gill, J., Where the petitioner's status in an election petition is objected to by preliminary objection, the evidence of his being entitled to petition against the return of the respondent being susceptible of easy proof by the production of the voters' list actually used, or a copy thereof certified by the clerk in Chancery, (R. S. C., ch. 8, secs. 41, 58 & 65, R. S. C., ch. 5, sec. 52,) the production at the *enquête* of a copy certified by the revising officer of the list of voters upon which his name appears, but which has not been compared with the voters' list actually used at said election, is insufficient proof. Gwynne and Patterson, JJ., dissenting.

Appeal dismissed with costs.

Morgan & Gemmill for appellant.

Belcourt & Plamondon for respondent.

OTTAWA, Oct. 10, 1892.

Nova Scotia.]

BRITISH AMERICA ASSURANCE CO. v. LAW.

Marine Insurance—Insurable interest—Insurance on advances—Construction of policy.

A policy of marine insurance on the barque Lizzie Perry was issued by the British American Assurance Company to W. L. & Co., managing owners of the vessel. The first part of the policy read as follows: "L. & Co. on account of owners, loss if any,

payable to L. & Co., do make insurance and cause to be insured, lost or not lost, the sum of \$2,000, on advances upon the body, tackle, etc. The policy was on a printed form, but the words "on advances" were inserted in writing. The remainder of the instrument was applicable to insurance on a ship only.

To an action on this policy the defence was that it only insured advances by the owners, which were not a proper subject of insurance, and the policy was, therefore, void. It was shown that L. & Co. had expended considerable money in repairs on the vessel.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the rule *ut res magis valeat quam pereat* required the policy to be construed, if possible, so as to make it a valid instrument, and this could be done either by striking out the words "on advances" as mere surplusage, or treating them as being a mere immaterial reference to the inducement which led the owners to insure the ship.

Appeal dismissed with costs.

Henry, Q.C., for appellants.

Borden, Q.C., for respondents.

OTTAWA, Oct. 10, 1892.

Nova Scotia.]

CHANDLER ELECTRIC CO. v. FULLER.

*Negligence—Manufacture of electricity—Discharge of steam—
Damage to adjoining property.*

F. was owner of a warehouse in the City of Halifax, used for storing iron, and had occupied the same for some twenty years. In 1889 the Chandler Electric Company established a station for generating electricity on the adjoining premises. Attached to the engine used by the Company in said business was a condenser which passed through the floor of their premises and discharged into the dock below, at a distance of some twenty feet from said warehouse. In March, 1889, the warehouse was found to be full of steam, which fact was communicated to the officers of the Company, who stated that they could not understand how it could have been caused by their engine. The steam continued to enter the warehouse, injuring the iron therein, and in 1890 an action was commenced by F. against the Company for such damage. The Company contended, as a defence to the action, that they were using the latest and best improvements in machinery

for their business, and that they operated the same in a proper manner and without negligence; that the injury, if caused by their engine, was due to the defective state of the plaintiff's premises; and that they were acting in pursuance of statutory powers contained in their act of incorporation, and were, therefore, exempt from liability. At the trial, judgment was given against the Company, and on appeal to the full court the Judges were equally divided.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the act causing the injury violated the rule which does not permit a person, even on his own land, to do an act which, lawful in itself, yet necessarily causes injury to another, and, especially as the injury continued after notice to the Company, the plaintiffs were entitled to recover damages therefor.

Appeal dismissed with costs.

F. H. Bell for the appellants.

Newcombe for the respondents.

OTTAWA, Oct. 10, 1892.

Nova Scotia.]

CROWE v. ADAMS.

Sheriff—Action against—Trespass or trover for seizing goods—Justification—Necessity to show judgment—Title to goods—Married Woman's Property Act (R. S. N. S. 5th Ser., c. 74).

A sheriff having seized goods under execution against Donald A., the wife of the execution debtor brought an action against him for trespass by such seizure, alleging that the goods seized were her separate property under the Married Woman's Property Act (R. S. N. S. 5th Ser., c. 74), and claiming also that the execution was void as her husband's name was Daniel and not Donald. On the trial the sheriff, under his plea of justification, put in evidence the writ of execution but did not prove the judgment on which it issued. The jury found that the plaintiff's right to the goods seized, whatever it was, was acquired from her husband after marriage, which would not make it her separate property under the act; they also found that the husband was well known by both names of Daniel and Donald. The trial judge held that the plea of justification was not proved by the production of the execution, but that proof of the judgment was necessary, and he gave judgment for the plaintiff, which was affirmed by the full court.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the action could not be maintained; that a sheriff

sued in trespass or trover for taking or converting goods seized under execution can justify under the execution without showing the judgment; *Hannon v. McLean* (3 Can. S. C. R. 706) followed; and that by the findings of the jury the goods seized must be considered to belong to the husband, which is a complete answer to the action.

Appeal allowed with costs.

Newcombe for the appellant.

Borden, Q.C., for the respondent.

OTTAWA, Oct. 10, 1892.

Nova Scotia.]

SMITH v. McLEAN.

Bill of Sale—Affidavit of bona fides—Adherence to statutory form—Description of deponent—R. S. N. S. 5th ser., c. 94, ss. 4 & 11.

By R. S. N. S. 5th ser., c. 94, s. 4, every bill of sale executed in Nova Scotia must be accompanied by an affidavit by the grantor that it is given in good faith, etc., and, by sec. 11, such affidavit shall be, as nearly as may be, in the form given in schedules to the act. The prescribed form begins as follows—"I. A. B. of..... in the county of..... (occupation) make oath and say." In an affidavit accompanying a bill of sale given under this act the occupation of the deponent was not stated.

Held, per Strong, Gwynne and Patterson, JJ., that as the affidavit referred in terms to the bill of sale itself, in which the occupation of the grantor was mentioned, the statute was complied with and the instrument was valid.

Per Taschereau, J.—The onus was on the persons attacking the bill of sale to prove, by direct evidence, that the deponent had no occupation, which they had failed to do.

The judgment of the Supreme Court of Nova Scotia was reversed.

Appeal allowed with costs.

Whitman for the appellants.

Silver for the respondent.

OTTAWA, Oct. 10, 1892.

New Brunswick.]

VAUGHAN v. RICHARDSON.

Marine insurance—Charter party—Disbursements—Difference in freight—Guarantee of part owner—Consideration—Misrepresentation—Pleading—Evidence.

V., part owner and managing owner of the ship *Eurydice*,

chartered her to R. for a voyage from Savannah to Liverpool; the charterer was to pay a lump sum for freight, and the master to sign bills of lading at any rate of freight without prejudice to the charter party; if the actual freight exceeded the sum payable by the charter the master of the ship was to give bills for the difference to R., payable ten days after the arrival of the ship at Liverpool, and the disbursements were to be secured by similar bills. When the ship was loaded it was found that the difference in freight was in favour of R., and by arrangement with the son of V., the managing owner, who held a power of attorney to act as his agent, the master drew two bills of exchange on the agents of the ship at Liverpool, one for the amount of the disbursements and the other for the difference in freight; each in favour of R. and payable sixty days after sight.

The bills were accepted by the agents but were not paid at maturity, and notice of dishonour was given to V. who, on receiving it, sent another of his sons to the solicitors who held the bills for collection. This son stated to the solicitors that his father would like the matter to be held over until he could communicate with the other owners, which was acceded to, and an agreement was drawn up, in the form of a letter to the solicitors, requesting them to delay proceedings on the bill for disbursements until the ship arrived at St. John, N. B. (where V. lived), and guaranteeing immediate payment on her arrival, of that bill with cost of protest, etc.; and also of the bill for difference in freight. This agreement was taken to V. who signed it, and it was returned to the solicitors. When the ship arrived V. paid the draft for disbursements, but refused to pay the other on the ground that he had supposed they were both for disbursements, and that the solicitors had so stated to his son when the agreement was prepared. An action was then brought against V. on his guarantee to pay the draft for difference in freight, to which he pleaded that he had been induced to sign the same by fraud and misrepresentation.

On the trial of the action it was proved that the son who acted for V. at Savannah under a power of attorney had at first refused to sanction the drawing of the bill for difference in freight, but finally agreed to it on receiving a letter stating the circumstances and what the draft was for, which letter, as he stated in giving evidence, he had sent to V., but it was not produced; the son who had called upon the solicitors swore that they had told him

that both bills were for disbursements and had so stated to his father; in this he was contradicted by V. himself, who said in his evidence that his son had told him that the larger bill was for disbursements and the smaller for difference in freight. His counsel contended, on moving against the verdict in favour of R., that he was incapacitated by age and infirmity from giving reliable evidence.

It was admitted by counsel for V. that any misrepresentation made by the solicitors as to the nature of the drafts, was an innocent misrepresentation only, and not made with intent to deceive. A verdict was given for the plaintiff, which the full court sustained.

Held, affirming the judgment of the Supreme Court of New Brunswick (28 N. B. Rep. 364), that the verdict should stand; that the defence of misrepresentation set up at the trial was not open to the defendant under the plea of fraud, and should have been distinctly pleaded; that no application to amend by adding such a plea having been made at the trial, it could not be entertained now, in view of the length of time the case had been in litigation and the delays that had taken place; that even if the defence were available nothing could be gained by ordering a new trial, as no jury could help finding for the plaintiff under the evidence given by the defendant himself, which would have to be read to the jury, the defendant having died since the trial.

Appeal dismissed with costs.

Barker, Q.C., and Palmer, Q.C., for appellants.

Hazen and Curry for respondents.

OTTAWA, Oct. 10, 1892.

New Brunswick.]

BUCK v. KNOWLTON.

*Marine insurance—Application to agent—Neglect to forward—
Liability of agent for—Privity of contract—Negligence—
Trover.*

B., wishing to insure his vessel, went to a firm of insurance brokers at St. John, N. B., to whom he gave an application for \$800 insurance at 11 p. c. on a valuation of \$2,500. The brokers sent the application by a clerk to K., the agent at St. John for an underwriter's company in Portland, Me., requesting a policy from his company. K. informed the clerk that he would not forward the application unless the valuation was put at \$3,000, or the premium raised to 12 p. c. This was never acceded to by

the brokers, and two days after K. forwarded an application to his company putting the valuation at \$3,000, and on the following day the vessel was burnt. The policy was sent to K., but recalled by telegram before it was delivered to B. or to the brokers, and was returned to the company. B. brought an action against K. claiming damages for negligence in not forwarding the application in proper time, with a count in trover for conversion of the policy.

Held, affirming the decision of the Supreme Court of New Brunswick that as K. never forwarded, nor undertook to forward, the application signed by the brokers on B.'s behalf, he owed no duty to B., and could not be liable for any negligence.

Held, further, that as the policy issued never ceased to be the property of the company, and was nothing more than an escrow in the hands of K., no action would lie against K. for its conversion.

Appeal dismissed with costs.

Palmer, Q.C., for appellants.

McLeod, Q.C., for respondent.

OTTAWA, Oct. 10, 1892.

Ontario.]

McDOUGALL v. CAMERON.

BICKFORD v. CAMERON.

Solicitor—Action for costs—Set-off—Mutuality—Appeal—Jurisdiction.

A firm of solicitors brought an action against certain clients on a bill of costs, to which action it was sought to set off a sum of money received by one of the solicitors from one of the clients for special services. The taxing officer allowed the set-off, but his decision was reversed on appeal.

Held, affirming the judgment of the Court of Appeal for Ontario, that, assuming the Court had jurisdiction to entertain the appeal, which was doubtful, the client was not entitled to set off, in an action by a firm, a sum paid to one of its members, the debts not being mutual; moreover, the money being paid to one of the solicitors for special services and not for services covered by the retainer to the firm, it could not be set off.

Held, per Taschereau, J., that the appeal was not from a final judgment within the meaning of the Supreme Court Act, and there was no jurisdiction to entertain it.

Appeal dismissed with costs.

Riddell & Nesbitt for appellants.

Ritchie, Q.C., for respondents.

OTTAWA, Oct. 10, 1892.

Ontario.]

WESTERN ASSURANCE CO. v. ONTARIO COAL CO.

Marine insurance—General average—Insurance on hull—Abandonment—Attempt to save vessel and cargo—Expense incurred—Liability of cargo to contribute—Average bond.

A schooner loaded with coal was stranded in Humber Bay near Toronto, and abandoned. The hull was insured but not the cargo, and notice of abandonment was given to the underwriters who secured the services of an experienced wrecker and a wrecking expedition, and attempted to save the vessel. It was considered advisable, and the best course in the interest of the owners of the cargo as well as the underwriters, to attempt to save the vessel and cargo together. Owing to stress of weather operations could not be begun for some days after the expedition was ready, and when the wreckers got to work a portion of the coal was taken out and attempts made to save the vessel, but without success, and she had to be abandoned. Before any of the cargo was delivered the owners and the underwriters executed an average bond by which, after a recital of the loss of the schooner, they respectively bound themselves to pay the losses and expenses incurred according to their respective shares in the vessel, her earnings as freight and her cargo, and that such losses and expenses should be stated and apportioned, in accordance with the established laws and usage of the province in similar cases, by a named adjuster. The adjuster apportioned the loss between the underwriters as owners of the material saved and the owners of the cargo, making the amount due from the latter \$2,314, and an action was brought against them on the average bond to recover the same. The sum of \$557 was paid into Court and liability beyond that amount was denied.

Held, affirming the judgment of the Court of Appeal (19 Ont. App. R. 41) of the Queen's Bench Division (20 O. R. 295) and of Boyd, C. (19 O. R. 462), that the average bond only obliged the owners of the cargo to pay what should be legally due according to the law of general average; that the cargo and the vessel were never in that common peril which gives the right to claim for general average; and that the sum paid into Court was sufficient to cover the cost which would have been incurred in saving the cargo by itself, and the underwriters were not entitled to recover more.

Appeal dismissed with costs.

Oster, Q.C., and Chrysler, Q.C., for appellants.

Delamere, Q.C., for respondents.

MAGISTRATE'S COURT.

MONTREAL, Dec. 5, 1892.

Coram CHAMPAGNE, J.M.C.

DAOUST v. CANADIAN PACIFIC R. Co.

Railway Act, Sec. 194, 196 — Liability of Railway Company for neglect to maintain fences—Animal killed on track of another company.

HELD:—*That where an animal gets on to the track of a railway company through defects in the railway fence, and thence strays on to an adjoining railway, and is there killed by that company's engines, the first company is not liable.*

The plaintiff sued for the value of a horse which, he alleged, came upon the defendant's line of railway from the pasture in which it properly was, through a defective fence separating the defendant's line of railway from such pasture, and thence got upon the track of the Grand Trunk Railway, which immediately adjoined the defendant's railway and was not separated from it by any fence, and was killed upon the track of the Grand Trunk Railway. The defendants admitted the facts as alleged.

N. Charbonneau for plaintiff:—

The defendants are liable, inasmuch as the proximate cause of the accident was the defect in the fence, which the defendants were bound to maintain. If this fence had been in proper order, the accident would not have happened.

H. Abbott, Q.C., for defendants:—

The obligation of the Railway Company to fence its line is statutory, and their liability upon a breach of that obligation is limited by the statute. By sec. 194, if the company neglects to maintain proper fences, it is liable only for damages caused to animals by any of the company's engines or trains, and is consequently not liable for damage caused by the trains or engines of another company. The common law obligation to fence, under Art. 505, C. C., has been extended and enlarged by statute in the case of railway companies, compelling them to fence their whole line at their own expense, and their liability for the non-fulfilment of the obligation must consequently be limited to that expressed in the statute. As to the non existence of the fence between the two railway lines, the obligation by the statute would be upon each of the companies to fence as against the other, as the statute evidently intended the fencing to be for the purpose

of preventing animals from getting on the railway; so that in this case, the obligation would be upon the Grand Trunk Railway to 'maintain a sufficient fence to have prevented the horse from getting on to its railway. In any event, there is no liability shown upon the defendants.

Mc Alpine v. G. T. R. Co., U. C. Q. B. at pp. 449-50.

Daniels v. G. T. R. Co., 11 Ont. A. R., 471.

Burton v. N. E. Ry. Co., L. R. 3 Q. B., 549.

Foucher v. O. & Q. Ry. Co., 11 L. N., 75.

CHAMPAGNE, J.:—

"Considérant que par la loi la défenderesse est tenue de faire et d'entretenir toute la clôture de chaque côté de son chemin de fer ;

"Considérant qu'à défaut de faire et d'entretenir cette clôture en bon ordre la défenderesse est responsable des dommages occasionnés par le fait que des animaux seraient tués sur sa voie par ses propres engins ;

"Considérant que dans le cas actuel il est admis que le poulain du demandeur a été tué sur la voie du Grand Tronc par les engins de ce dernier, la défenderesse ne peut être tenue responsable ; déboute l'action du demandeur avec dépens."

Nap. Charbonneau for plaintiff.

F. E. Meredith for defendants.

INSOLVENT NOTICES.

Quebec Official Gazette, Dec. 3 & 10.

Judicial Abandonments.

BEAULNE, Jacques, hotel-keeper, Montreal, Dec. 5.

BISSON, L. W., cigar-dealer, Montreal, Dec. 3.

BOURASSA, Philippe E., Hadlow Cove, Nov. 25.

GIGUÈRE, Joseph Hector, grocer, Montreal, Dec. 2.

GINGRAS, Charles E., Quebec, Nov. 29.

Curators Appointed.

BERNARD, Jos. S., Cap St. Ignace.—A. Toussain, Quebec, curator, Dec. 2.

BOURASSA, P. E., Hadlow Cove.—H. A. Bedard, Quebec, curator, Dec. 5.

CHISHOLM, Alexander, produce merchant, Montreal.—Riddell & Common, Montreal, curators, Nov. 25.

DAGENAIS, Amédée, Ste. Cunégonde.—Kent & Turcotte, Montreal, joint curator, Dec. 5.

MILES, Gabriel, Grand Pabos.—H. A. Bedard, Quebec, curator, Nov. 30.

ROY, Alfred, Thetford Mines.—H. A. Bedard, Quebec, curator, Sept. 2.

UPTON SHOE Co., Upton.—J. O. Dion, St. Hyacinthe, curator, Dec. 3.

GENERAL NOTES.

HANDCUFFED PRISONERS IN THE STREETS.—The Home Secretary, in reply to an objection to prisoners being conveyed through the streets of Woolwich handcuffed, has written to the Woolwich Local Board of Health stating that orders have been issued that no prisoners other than those accused of serious crimes or likely to be violent, are in future to be handcuffed. The letter also states that the police have power to engage cabs when necessary.

IS IT LARCENY?—Is it a crime to steal electricity? Indeed, is that imponderable and elusive agent a commodity, and as such can it be stolen? These questions have been raised in a court in St. Louis, but the answer returned is not satisfactory. A man was charged with tapping a wire of an electric light company in order to get illumination free. The grand jury was in doubt as to whether he had been guilty of fraud, and, according to the reports, the judge failed to see that it was a case of petit larceny; consequently the man went free. It behooves the electric light companies to look into this matter. This is said to be the first case of the kind, but it is not likely to be the last. The rights of the manufacturers of electricity will no doubt soon be fully established, and purloiners of the fluid will have to accept the natural consequences of their actions.—*N. Y. Tribune.*

PRIVILEGE FROM ARREST.—Mr. Justice Collins sat in the Queen's Bench Division, on October 25, for the purpose of trying cases, without having the assistance of a jury. One of the cases so disposed of was an action for damages for trespass and illegal distress, and in it the plaintiff himself gave evidence. Almost immediately after he had left the Court, and whilst he was in the immediate precincts of it, he was arrested by a policeman upon a magistrates' warrant, issued in consequence of the non-payment of parochial rates. Mr. Watt, later in the day, applied to his lordship for an order that the plaintiff should be released from custody. The learned counsel said that the rule was that a suitor or witness was protected from arrest whilst going to or returning from the Court, unless the arrest should be for a criminal offence, or by way of punishment. In the case in question there was no criminal offence, nor was the arrest to be by way of punishment, because the defaulter would at any time be released upon payment of the amount due.—Mr. Justice Collins thought that the warrant was simply a process to enforce payment of the rate, and that the witness was privileged from arrest. He therefore ordered the policeman to release his prisoner. This order was at once obeyed, and the plaintiff was set at liberty.

INDEX TO REPORTS
AND
ABSTRACTS OF CASES.

INDEX TO REPORTS

AND

ABSTRACTS OF CASES.

ACCOUNT.	PAGES
Action for reformation of—Form of judgment therein— <i>Désistement</i> from part of judgment—Costs	57
ACQUIESCENCE.	
36 Vic. ch. 81 (P.Q.)—Booms—Proprietary rights—Replevin—Estoppel by conduct.....	371
ARROLES.	
Ownership of.....	337
APPEAL.	
Acquiescence in judgment—Jurisdiction—36 Vic. c. 81, P.Q.—Charges for boomage—Agreements—Renunciation to rights—Estoppel by conduct—Tacit renunciation.....	164
Final judgment—Action <i>en reprise d'instance</i> —Art. 439, C.C.P.—R.S.C. ch. 135, secs. 2, 24 and 28.....	372
Jurisdiction—Action in disavowal—Prescription—Appearance by attorney—Service of summons—C.S.L.C., ch. 83, sec. 44.....	39
Mining lands—Bornage—Injunction—Jurisdiction—R.S.C., ch. 9.....	373
Questions of fact—Interference with decision of trial judge.....	21
Road repair—Municipal by-law—Validity of—Rights in future—Supreme and Exchequer Courts Act, sec. 29 (b).....	277
To Supreme Court—New trial—Verdict against weight of evidence—Interference with.....	217
See JURISDICTION.	
ARCHITECT.	
Submission of plans—Contract—Damages.....	14
ARREST.	
Privilege from—Plaintiff returning from Court—Warrant for commitment for non-payment of rates.....	344
ATTORNEY.	
Attorney <i>ad litem</i> —Acquiescence in judgment.....	166
BANK STOCK.	
Substituted property—Registration—Arts. 931, 938, 939, C.C.—Shares in trust— <i>Condictio indebiti</i> —Arts. 1047, 1048, C.C.....	52

	PAGES
BILL OF SALE.	
Affidavits of <i>bona fides</i> —Adherence to statutory form—Description of deponent —R. S. N. S., 5th Ser., c. 94, ss. 4 and 11.....	377
BUILDING SOCIETY.	
Acquiescence in judgment—Attorney <i>ad litem</i> —Right of appeal—Building Society—C.S.L.C., c. 69—By-laws—Transfer of shares—Pledge—Art. 1970, C.C.—Insolvent—Creditor's right of action—Art. 1981, C.C.....	166
CAPIAS.	
Affidavit—Allegation of indebtedness.....	360
Sequestration—Sale of effects and business.....	355
CARRIER.	
Completion of contract—Responsibility for loss of goods after arrival at destina- tion.....	274
Goods refused by consignee—Sale by carrier.....	38
Lien of—Thing deposited at place of destination.....	355
Special conditions and rates for carriage of goods requiring special care—Loss where higher rate is not paid.....	130
Successive carriers—Responsibility for delay in delivery of goods.....	35
CIRCUIT COURT.	
Jurisdiction—To set aside deed with consideration exceeding \$200.....	369
COMPANY.	
Act of incorporation—Forfeiture of—44 Vic. c. 61 (D)—Attorney-General of Canada—Information—R.S.C., c. 21, s. 4— <i>Scire facias</i> —Form of proceedings —Arts. 997 <i>et seq.</i> C.C.P.—Subscription to capital stock—Condition pre- cedent.....	276
Issue of shares at a discount.....	128
COMPOSITION.	
Loan to effect payment—Secret agreement—Failure to pay—Arts. 1039 and 1040, C.C.....	40
CONSPIRACY.	
Illegal agreement—Company—Shares—Market—Agreement to buy shares in order to create a market.....	248
CONSTITUTIONAL LAW.	
B.N.A. Act, sec. 91—Interest—Legislative authority over—Municipal Act— Taxation—Additional rate for non-payment.....	18
Constitution of Manitoba—33 Vic. c. 3 (D.)—Act respecting education—Denom- inational rights—Separate schools.....	12
Executive power—Commission of inquiry—R.S.Q., 596, 598—Prohibition, Writ of.....	37
Sale of intoxicating liquors—Municipal corporation—Art. 561, M.C.—R.S.Q. 6118.....	37
The Manitoba and B.N.A. Acts—Denominational schools in Manitoba—Right of Roman Catholic or English Church thereto—Manitoba Schools Act of 1890.....	293
Validity of Dominion Acts—31 Vic. c. 17 (D.)—33 Vic. c. 50 (D.)—Banking and incorporation of banks—Bankruptcy and Insolvency—Taxation—Exemption —Crown lands—Beneficial interest of Crown.....	55

CONTRACT.	PAGES
Affecting action of public bodies—Public policy.....	229
Agreement for service—Specific performance—Remuneration for services— Quantum meruit.....	218
Consideration—Stifling prosecution.....	214
Construction of railway—Standard of quality—Evidence.....	11
Contractual capacity of the insane.....	127
Corporation—Capacity to contract except under seal.....	55
Deed of land—Evidence—Agency—Statute of frauds—Parol testimony.....	154
Engineer's certificate—Finality of—Bloc sum contract—Deduction—Engineers, Powers of—Interest.....	52
Manufacture of patented articles—Substitution of new agreement for— Evidence.....	292
Rescission—Mistake—Performance of conditions—Revocation of trust.....	116
Telephone service—Transmission of messages—Construction of term—Breach.	108
Tender for—Acceptance—Bond—Condition of—Consideration.....	19
COSTS.	
Costs of proceedings before Exchequer and Supreme Courts of Canada—Solicitor and client—Quantum meruit—Parol evidence—Art. 3,597, R.S.Q.....	373
Plaintiff awarded less than sum demanded—Adjudication as to costs where there has been no tender by defendant.....	178
CREMATION.	
Application to be allowed to remove body for purpose of cremation.....	233
CRIMINAL LAW.	
Attempt to steal—Proof.....	224
53 Vict. (D.) ch. 37, s. 11—Conjugal union—Cohabitation.....	31
Conviction for gaming—Insufficient evidence of support by gaming.....	251
Dying declarations, Admissibility of.....	329
False pretences—Obtaining board by fraud.....	235
Hearing before magistrate—Refusal to admit evidence—Mandamus.....	141
Larceny—Possession obtained by fraud—Larceny by a trick.....	266
Refusal to provide for wife.....	38
CRIMINAL PROCEDURE.	
Reserved case—Amendment—Notice to prisoner to produce document—Verbal evidence.....	14
CROWN.	
Contract—Carriage of mails—Authority of Postmaster-General.....	108
Government railway—43 Vic. c. 8—Construction of—Damage to farm from over- flow of water—Negligence—Boundary ditches—Maintenance of.....	197
Liability of Crown as common carrier—Negligence—Regulations for carriage of freight—Notice by publication in Canada Gazette—Government Railways Act, 1881—Exchequer Court Act (50-51 Vic. c. 16, s. 16)—Construction.....	358
Negligence of servant—Liability of Crown—50-51 Vic. ch. 16—Prescription— Arts. 2262, 2267, 2188, 2211, C.C.....	149
Not responsible for goods stolen from examining warehouse.....	131, 171
Tort—Injury to the person on a public work—Remedy—Prescription, Interrup- tion of—Art. 2227, C.C.L.C.—50-51 Vic. c. 16.....	357

CROWN LANDS.	PAGES
Location tickets—Transfer of purchaser's rights—Registration of—Waiver by Crown—Cancellation of license—23 Vic. c. 2, ss. 18 & 20—32 Vic. c. 11, s. 18 (Q)—36 Vic. c. 8 (Q).....	42
DAMAGES.	
Seizures made by creditor in ordinary course—Technical irregularity—Probable cause.....	145
DEED.	
Construction of—Trust—Parol evidence of—Enforcement.....	116
Rectification—Absolute in form, but intended to be a mortgage—Evidence of intention—Character of.....	204
DOMINION LANDS.	
Sale—Reservation of mines and minerals—Dominion Lands Act (40 Vict. c. 26)—Rights of purchaser.....	359
DONATION.	
Donation <i>inter vivos</i> —Subsequent deed—Giving in payment—Registration—Arts. 806, 1592, C.C.....	164
DOWER.	
Defective title—Grant by provincial government of Dominion lands—Estoppel—Local Act.....	278
ELECTION LAW.	
Ballot papers—Recount—Which admissible and which inadmissible.....	136
Controverted Elections Act—Appeal—Deposit—Proper officer—R.S.C. c. 9, s. 51—54-55 Vic. c. 20, s. 12 (D.).....	114
Dominion controverted elections Act—Appeal—Evidence—Reversal—Loan for travelling expenses—Proof of corrupt intent—40 Vic. ch. 3, ss. 88, 91; sec. 84 (a)—(e)—Executory contract, sec. 131—Free Railway tickets.....	152
Dominion Controverted Elections—Election petition—Preliminary examination of respondent—Order to postpone until after session—Effect of Six months' limit—R.S.C. ch. 9, secs. 19 & 32.....	102
Dominion Controverted Elections—Election petition—Preliminary objections—Deposit of security—R.S.C. ch. 9, sec. 9, (f).....	101
Dominion Controverted Elections—Election petition—Status of petitioner—Onus probandi.....	101
Dominion Controverted Elections—Election petition—Status of petitioner—When to be determined—R.S.C. ch. 9, secs. 12 & 13.....	103
Election Appeal—Discontinuance—Effect of—Practice—Certificate of registrar—New Writ.....	195
Election petition—Appeal—Dissolution of Parliament—Return of Deposit.....	57
Election petition—Judgment—R.S.C. c. 9, s. 43—Enlargement of time for commencement of trial—R.S.C. c. 9, s. 33—Notice of trial—Shorthand writer's notes—Appeal—R.S.C. c. 9, s. 50 (b).....	212
Election petition—Judgment voiding election—Trial—Commencement of—Six months—Consent to reversal of judgment—R.S.C. ch. 135, s. 52.....	196
Election petition—Status of petitioner—Preliminary objection—Lists of voters—Dominion Elections Act, R.S.C. ch. 8, secs. 30 (b), 31, 33, 41, 54, 58 & 65—The Electoral Franchise Act—R.S.C. c. 5, sec. 32.....	374

	PAGES
Election petition—Preliminary objections—Personal service at Ottawa—Security—Receipt—R.S.C. ch. 9, sub-secs. (e) and (g) and sec. 10.....	8
Election petition—Preliminary objections—R.S.C. ch. 9, s. 63—English General Rules—Copy of petition—R.S.C. ch. 9, sec. 9 ₁ (h)—Description and occupation of petitioner.....	7
Election petition—Preliminary objections—Service at domicile—R.S.C. ch. 9, sec. 10.....	7
Election petition—Preliminary objections—Service of petition—Security—R.S.C. ch. 9, sec. 10, and sec. 9 (e) and (g).....	10
Election petition—Preliminary objections—Status of petitioner—Onus probandi	8
Election petition—Re-service of—Order granting extension of time—Preliminary objections—R.S.C. ch. 9, sec. 10—Description of petitioner.....	9
Promise to procure employment by candidate—Finding of the trial judges—49 Vic. ch. 8, sec. 84 (b)	153
EVIDENCE.	
Letter of guarantee by bank—Claim for loss—Proof of claim—Accounts sales....	197
EXECUTOR.	
Action against—Legacy—Trust—Claim on Assets—Charge on realty.....	280
EXPROPRIATION.	
Q.R.S. 5164, ss. 12, 16, 17, 18, 24—Award—Arbitrators—Jurisdiction of—Lands injuriously affected—43-44 Vic. ch. 43, P.Q.—Appeal—Amount in controversy—Costs.....	42
Value of land taken—Award by Exchequer Court Judge—Appeal.....	213
EXPROPRIATION UNDER RAILWAY ACT.	
R.S.C. ch. 109—Discretion of arbitrators—Award.....	51
FRAUD.	
Action of deceit—Statement made recklessly and without belief in its truth—Evidence of fraud—Nonsuit—New trial.....	248
GAMING TRANSACTIONS.	
Margin deposited with broker for speculative stock transactions—Action to recover.....	369
GOVERNMENT LANDS, B.C.	
Pre-emption—Statutory right to—Lands reserved.....	168
IMMOVABLE.	
Gas and water pipes laid by a gas and water company form part of the realty of the company, and are taxable as real estate.....	22
INJUNCTION.	
To prevent encroachment—Boundaries not determined—Bornage.....	15
INSOLVENCY.	
Claim against insolvent—Notes held as 'collateral security—Collocation—Joint and several liability.....	99
Joint and several debtors—Distribution of assets—Privilege—Winding up Act, sec. 62—Deposit with Bank after suspension.....	100
Winding-up proceedings—Liquidator's commission—Allowance of commission on set-off.....	140
INSURANCE, ACCIDENT.	
Knowledge of agent imputed to principal.....	340

	PAGE
Immediate notice of death—Waiver—External injuries producing erysipelas —Proximate or sole cause of death.....	150
Risk incidental to employment—Breach of contract.....	36
INSURANCE, FIRE.	
Application—Description of building—Variance—Falsa demonstratio non nocet	113
Insurable interest—Property in goods—Construction of contract—Statement in application—Warranty or representation—Breach of condition—Evidence .	289
Transfer of fire insurance risk—Contract—Agent—Powers of—Art. 1735, C.C.— Custom—Question raised for first time before Court of last resort.	225, 309
INSURANCE, GUARANTEE.	
Conditions of policy—Notice to Company of discovery of fraud.....	92
INSURANCE, LIFE.	
Application—False statements.....	235
Payment of rebates by agents of life insurance companies.....	226
INSURANCE, MARINE.	
Application to agent—Neglect to forward—Liability of agent for—Privity of contract—Negligence—Trover.....	379
Charter party—Disbursements—Difference in freight—Guarantee of part owner —Consideration—Misrepresentation—Pleading—Evidence.....	377
General average—Insurance on hull—Abandonment—Attempt to save vessel and cargo—Expense incurred—Liability of cargo to contribute—Average bond.....	361
Insurable interest—Insurance on advances—Construction of policy.....	374
INTERNATIONAL LAW.	
Enforcement of penal law of another country.....	97
Prerogative of Crown—Act of State—Personal responsibility of agent of Crown.	245
JURISDICTION.	
Action for call of \$1,000—Future rights—R.S.C. sec. 29, sub-sec. (b) of the Supreme and Exchequer Courts Act.....	104
Actions in Quebec against foreign corporations—Service.....	49
Appeal to Supreme Court—Monthly allowance of \$200—Amount in controversy —Annual rent—R.S.C. ch. 139, sec. 29 (b).....	277
Appeal to Supreme Court—Action to set aside municipal by-law—Supreme and Exchequer Courts Act, sec. 24 (g).....	150
Appeal—Proceeding originating before judge in chambers—Right to tax costs— Party chargeable—Rate-payer—R.S.O. (1887) c. 147, s. 43.....	218
Appeal to Supreme Court—Security for costs—Final judgment.....	215
Fraudulent conveyance—Action to set aside by creditor—Amount in controversy —Appeal to Supreme Court—Jurisdiction—R.S.C. ch. 135, s. 29.....	211
Supreme Court—Action to set aside a <i>procès verbal</i> or by-law—Appeal—Sec. 24 (g) and sec. 29 of the Supreme and Exchequer Courts Act.....	5
Supreme Court—Appeal—Future rights—Title to lands—Servitude—Supreme & Exchequer Courts Act, sec. 29 (b).....	6
Supreme and Exchequer Courts Amending Act, 1891, sec. 3—Appeal from Court of Review.....	40

	PAGES
Supreme and Exchequer Courts Amending Act, 1891—54-55 Vic. ch. 25, s. 3— Appeal from Court of Review—Case standing over for judgment—Amount necessary for right of appeal—Arts. 1178 & 1178 (a) C.C.P.	371
Supreme Court—By-law—Appeal as to costs—Supreme and Exchequer Courts Act, sec. 24.	6
<i>See APPEAL.</i>	
LESSOR AND LESSEE.	
Amount claimed—Arts. 887 & 888, C.P.C.—Jurisdiction.	149
LIBEL AND SLANDER.	
Libel by newspaper—Justification—Facts grossly misstated—Costs.	141
Person holding office of honor—Charge of unfitness.	195
Poster advertising account for sale—Justification.	140
Provisions of Act relating to newspapers—Compliance with—Special damages —Loss of custom—50 Vic. cc. 22 & 23 (Man.)	106
LICENSE ACT.	
Salaries of license inspectors—Approved by governor general in council— Liquor License Act, 1883, s. 6.	167
LIMITATIONS, STATUTE OF.	
Possession—Caretaker—Acts of ownership.	20
LOTTERIES.	
Constitutionality of the Dominion Act, R.S.C. 159.	179
MANDAMUS.	
Establishment of new school district—School visitors—Superintendent of Edu- cation—Jurisdiction of, upon appeal—Approval of three visitors—40 Vic. ch. 22, sec. 11, P.Q., R.S.Q. Art. 2055.	41
MORTGAGE.	
Debtor and creditor—Mortgage—Preference by—Pressure—R.S.O. (1887), c. 124, s. 2.	200
Foreclosure suit—Parties—Lessee of mortgagor—Protection of rights of—Prac- tice.	281
Rectification—Property not included—Evidence.	199
MUNICIPAL CORPORATION.	
Control over streets—Duty to repair—Transferred powers—Negligence—Notice of action—Defence of want of—34 Vic. c. 11 (N.B.), 25 Vic. c. 16 (N.B.).	203
Drainage work—Non-completion—Mandamus—Ontario Municipal Act.	291
Duty to light streets—Liability for negligence—Obstruction on sidewalk— Position of hydrant.	214
Exercise of municipal powers—Municipal Act (R.S.O. 1887) c. 184, ss 483, 569, 583, 586—Drainage of flooded lands—Lands injuriously affected—Remedy— Arbitration—Mandamus—Notice.	279
Maintenance of county buildings—Establishment of County Court house and gaol—Right to remove from shire town.	213
Powers of—Right to enter lands of another municipality for sewage purposes— Restrictions—R.S.O. (1887), c. 184, s. 479, s.s. 15—51 Vic. c. 28, s. 20 (O).	117

	PAGE
Repair of streets—Excavation—Injury to adjoining land—By-law—Expropriation—Land injuriously affected—51 Vic. c. 42, s. 190 (B.C.).....	206
MUNICIPALITY.	
Final judgment—Practice—Specially endorsed writ—Summary judgment on...	56
NEGLECT.	
Accident—Liability of hotel-keeper—Trap-door.....	140
Child killed on street railway.....	32
Liability of road company—Collector of tolls—Lessee.....	201
Manufacturer of electricity—Discharge of steam—Damage to adjoining property	375
NEGOTIABLE INSTRUMENT.	
American railroad bond—Bond <i>fide</i> holder for value.....	234
<i>See</i> PROMISSORY NOTE.	
NOTARIAL CODE.	
R.S.Q. Art. 3871—Board of notaries—Disciplinary powers—Prohibition.....	373
ORDNANCE LANDS.	
Sale—Cancellation—23 Vic. c. 2, s. 20.....	356
PERSONAL INJURIES.	
Action by father for personal injuries to minor child—Medical examination of child.....	38
PHYSICIAN.	
Proof of services—C.C. 2260—32 Vic. (Q) c. 32, s. 1—R.S.Q. 5851.....	14
PLEADING.	
Sufficiency of allegations—Demurrer—Compound interest.....	92
POSTMASTER GENERAL.	
Authority of.....	198
POWER OF ATTORNEY.	
Construction—Authority to settle or adjust claim—Right to receive payment...	199
PRACTICE.	
Proceedings in equity—Parties.....	53
Trial—Charge to jury—Misdirection—New trial—Negligence.....	208
PRACTICE, EXCHEQUER COURT.	
Extension of time for leave to appeal after period prescribed by statute has expired—Exchequer Court Act (1887) sec. 51, 53 Vic. c. 35, s. 1—Grounds upon which extension will be granted.....	171
PREScription.	
Action of widow under Art. 1056, C.C.—Bodily injuries—Art. 2262, C.C.....	70, 259
Interest on judgment prescribed by five years.....	177
PROBABLE CAUSE.	
Action for malicious prosecution.....	50
Arrest as a dangerous lunatic—Damages.....	141
PROCEDURE.	
Actions for alimentary allowance <i>in forma pauperis</i>	91
Execution—Seizure of movables—Lapse.....	66
Husband and wife—Wife erroneously described as separated as to property—Exception to the form—Amendment—Husband summoned only to authorize his wife—Cannot be made a party personally on motion to amend..	32

	PAGES
Jury trial—Non-suit.....	370
Service—Exception to the form.....	108
PROMISSORY NOTE.	
Aval—Notice of protest—Retroactive effect.....	327
Endorser not discharged by delay given to maker.....	307
Endorsement—Revision of ruling at enquête.....	324
Evidence necessary to hold an endorser as warrantor.....	50
Failure of consideration—Laches.....	115
Illegal consideration—Speculative transactions—Gaming contract—Art. 1927 C.C.....	93
Form of—Indorsement by party not named—Liability as maker.....	216
Signature obtained by fraud—Holder in good faith.....	66
RAILWAY.	
Animals killed while straying on track.....	119
Construction of line under charter—Money advanced and control exercised by another company—Liability of latter as to it—Tort-feasor.....	12
Goods wrongly described.....	365
Horses killed—53 Vic. (D) c. 28, s. 2.....	15
Negligence—Construction of road—Interference with highway—Neglect to ring bell.....	158
Power of city to extend its streets across a railroad.....	65
Railway Act, secs. 194, 196—Liability of railway company for neglect to main- tain fences—Animal killed on track of another company.....	382
Sparks from locomotive.....	366
REGISTRATION (NOVA SCOTIA).	
Registry Act—R.S.N.S. 5th ser. c. 84, s. 21—Registered judgment—Priority— Mortgage—Rectification of mistake.....	155
RELIGIOUS SOCIETIES.	
Incorporation—Notice—Withdrawal of faction.....	234
SALE OF MOVABLES.	
Slight variation from conditions of contract—Sight drafts.....	38
Time fixed for shipment—Performance.....	34
SALE OF IMMOVABLE.	
Unpaid vendor—Privilege of—Opposition to sale of immovable seized Art. 657, C.C.P.—Shareholder—Company.....	15
SHERIFF.	
Action against—Trespass or trover for seizing goods—Justification—Necessity to show judgment—Title to goods—Married Woman's Property Act (R.S.N.S., 5th Ser., c. 74).....	376
SHIPPING.	
Salvage—Government vessel—Special contract.....	358
Salvage of ship and cargo—Principal and agent—Power of attorney given by crew to agent of owners of salving vessel for purpose of adjustment of sal- vage claim.....	172
SLEEPING CAR COMPANY.	
Responsibility for articles brought by traveller into a sleeping or parlor car....	51
SOLICITOR.	
Action for costs—Set-off—Mutuality—Appeal—Jurisdiction of Supreme Court..	380

	PAGE
Bill of costs—Proceedings before taxing officer—Evidence of settlement—Appeal	20
STATUTE.	
Construction of—Transfer of personal property—Preference by—Pressure—Intent.....	165
SUBSTITUTION.	
Curator to—Action to account—Indivisi- bility of— Will—Construction—Transfer—Effect of—Sale of rights—Mandatory—Negotiorum gestor—Parties to suit for partition—Art. 920, C.C.P.—Purchase by co-heir while curator—Art. 1484, C.C.....	169
SURETY.	
Obligation with a term—Insolvency of principal debtor—Arts. 1933, 1934, C.C..	142
TARIFF OF FEES.	
Interpretation of new tariff.....	98
TAXATION.	
Assessment and taxes—Irregular assessment—By-law—Validating Acts—Effect of—Crown Lands.....	164
Exemption from—Lands sold or occupied—Crown lands—Locus.....	54
Insane Asylum—Charitable institution—Exemption—R.S.Q. 2044, 6146.....	58
TELEGRAPH COMPANY.	
Cannot contract that it shall not be responsible for its own negligence.....	34
TIMBER LICENSE.	
Petition of right, P.Q.—R.S.C. Art. 5976—Sale of timber limits—Licenses—Plan—Description—Damages—Art. 992, C.C.....	165
TITLE TO LAND.	
Action against estate for debt of executor—Purchase by executor at sale under execution—Constructive trust—Statute of limitations.....	156
TRADE MARK.	
Rectification of register—Jurisdiction of Exchequer Court—54-55 Vic. c. 26; 54-55 Vic. c. 35.....	357
Right to use name of town in title of manufactured article.....	48
Use of name in ordinary course of business.....	191
TRESPASS TO LAND.	
Title—Application for new trial—Misdirection—Misconduct of jurors—Nominal damages.....	118
TRUST.	
Stock—Shares assigned in trust—Duty of transferee to make inquiry.....	202
WATER COURSE.	
Floatable river—Seigniorial rights—C.S.L.C. ch. 51—Expertise—Direct action—Conclusions.....	36
WILL.	
Captation.....	355
Construction—Devise to children and their issue—Estate to be "equally" divided—Per stirpes or per capita—Statute of Limitations—Possession—Trustee.....	157
Letter of instructions to attorney.....	191
WRIT OF ERROR.	
Plaintiff in contempt.....	32

GENERAL INDEX.

	PAGES
ACTION UNDER ART. 1056, C.C., THE.....	67
AEROLITE, OWNERSHIP OF.....	337
APPEAL, PROCEEDINGS IN, MONTREAL.....	58, 93, 137, 173, 187, 314, 366
BALLOT PAPERS, COUNT OF.....	136
BATES, W. A., DEATH OF.....	350
BRAMWELL, LORD, THE LATE.....	237
CANADIAN CRIMINAL CODE.....	333
CHURCH, MR. JUSTICE, THE LATE.....	269
CONSTITUTIONAL QUESTION—DISSOLUTION OF THE QUEBEC LEGISLATIVE ASSEMBLY.....	4
CROSS-EXAMINATION—A SOCRATIC FRAGMENT.....	243
COURTS, WORK OF THE CIVIL.....	287
CREMATION—BURIAL SERVICE.....	283
CRIMINAL CODE OF CANADA.....	210
CRIMINAL IMPULSE, UNCONTROLLABLE.....	185
CROWN NOT RESPONSIBLE FOR GOODS STOLEN FROM EXAMINING WAREHOUSE.....	131
CURRENT TOPICS :	
Absence of serious crime in the Province of Quebec.....	354
Admission to professions.....	129
Appeal business at Montreal.....	18
Blackford, Mr. Justice, as a reporter.....	227
Bramwell, Lord, Death of.....	146
Bruce, Mr. Justice, Appointment of.....	226
Century of legislation, A.....	306
Church, Mr. Justice, Resignation of.....	17
Church, Mr. Justice, Death of.....	257
Codes and code amendments.....	145
Costs, where plaintiff is awarded less than the amount demanded.....	178
Cross, Mr. Justice, Retirement of.....	321
DeLorimier, T. C., Death of.....	370
Denman, Mr. Justice, Retirement of.....	322
Digby, K. E., Appointment of.....	97
Ex-judges and lawyers in political positions.....	353
Hall, Mr. Justice—Appointment of.....	17
Honors to Canadians—Chief Justice Lacoste and Messrs. Abbott and Mowat knighted.....	161
Illness of judges.....	33
Incarceration of sane persons in lunatic asylums.....	354
Judges, Remuneration of.....	322
Judicial changes in England.....	178, 193

	PAGE
Judicial salaries, Proposed augmentation of.....	129
Lenient sentences.....	256
London Metropolitan police system.....	273
Macrae, G., Death of.....	354
Members of parliament, Attendance of.....	194
Mixed juries in New Zealand.....	163
Official reports of Quebec.....	179
Paper and Ink.....	162
Payment of rebates by agents of life insurance companies.....	226
Proportion of cases reported in England.....	306
Proposals respecting the administration of justice.....	273
Responsibilities of carriers.....	274
Retrospective—Appointments and changes on the bench.....	1
Royal Commission—Closing proceedings of.....	2
Schiller Will Case.....	355
September appeal term at Montreal.....	305
Slander, The law of.....	194
Strong, Chief Justice, Appointment of.....	370
Tessier, The late Mr. Justice.....	130
United States Supreme Court, Definition adopted.....	97
Widow's action for death of husband.....	257
DEATH OF PRINCE VICTOR—Chief Justice Lacoste on.....	43
DENMAN, MR. JUSTICE, RETIREMENT OF.....	345
GENERAL NOTES:	
Attempt to steal.....	224
Bankruptcy returns.....	47
Cambridge University, Jurisdiction of.....	46
Canadian Criminal Code.....	222, 288
Contractual capacity of the insane.....	127
Crime in the United States.....	304
Delays of Justice.....	128
Divorce in France and the United States.....	48
Dramatic scene at a funeral.....	208
English bar and the administration of justice.....	256
Evidence in Japanese Courts of Justice.....	272
Exercise of the franchise by women.....	191
Foreign marriages.....	288
Handcuffed prisoners in the streets.....	384
Ingenious use of electricity.....	320
Issue of shares at a discount.....	128
James, Edwin.....	254
Judicial qualifications.....	224
Ladies and peerages.....	47
Larceny of electricity.....	384
Law of gaming.....	144
Liability of bank directors.....	255

	PAGES
Life policy, An old	223
Limits of cross-examination	64
Montreal Court House	47
Negro colonial judges	191
Nolle prosequi, Effect of	191
Photographer's use of pictures	254
Privilege from arrest	384
Secrecy of the confessional	47
Tax on employers	47
Tobacco as a drink	192
Trade-mark case	48
Trial by jury in India	368
Use of name—Trade-mark	191
Wills	191
INSOLVENT NOTICES	16, 44, 61, 95, 112, 123, 142, 169, 176, 188, 208, 221, 240, 252, 271, 314, 335, 351, 368, 383
LEGISLATION OF 1892—ABANDONMENT OF PROPERTY	219
LOTTERIES, THE LAW OF—Constitutionality of the Dominion Act, R.S.C. 159	179
MILL CASE	329
OBITUARY :	
Bates, W. A.	350
Bramwell, Lord	237
Church, Mr. Justice	257, 269
De Lorimier, T. C.	370
Macrae, G.	354
Ritchie, Chief Justice	308
Tessier, Mr. Justice	130
PARK AND LITERARY FRAUD CASES	347
PARKMAN-WEBSTER CASE	363
PUBLICATIONS, NEW :	
Chapman's Medical Jurisprudence	324
Hunter's Insurance Corporations Act	210
Maclaren on Bills and Notes	147
Travis on Sales	148
RESPONSIBILITIES OF RAILWAY COMPANIES	365
RITCHIE, CHIEF JUSTICE, THE LATE	308
SHOOTING SEDUCERS	332
STOCK EXCHANGE TRANSACTIONS	249
TARIFF OF FEES, THE NEW	98
TESTAMENTARY CAPACITY	241



Stanford Law Library



3 6105 06 118 644 5

